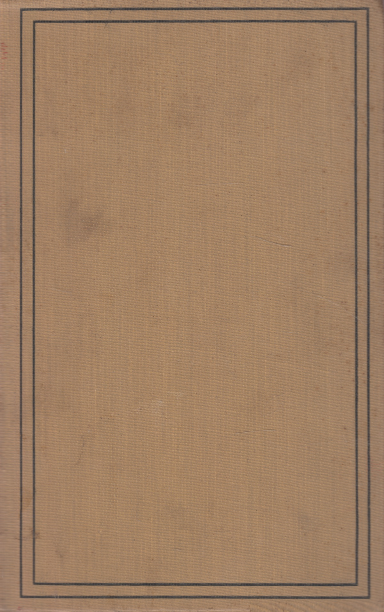


CASES DECIDED

IN

THE COURT OF CLAIMS

OF

THE UNITED STATES

JUNE 1, 1929, TO JANUARY 31, 1930

WITH

ABSTRACT OF DECISIONS OF THE SUPREME COURT IN COURT OF CLAIMS CASES

REPORTED BY

EWART W. HOBBS

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FENTON W. BOOTH

Judges

SAMUEL J. GRAHAM — BENJAMIN H. LITTLETON [1]

WILLIAM R. GREEN — THOMAS S. WILLIAMS [1]

Auditors

EWART W. HOBBS — JOHN K. M. EWING

Secretary

WALTER H. MOLING

Chief Clerk

J. BRADLEY TANNER

Assistant Clerk

FRED C. KLEINSCHMIDT

Bailiff

J. J. MARÇOTTE

Assistant Attorney General

(Charged with the defense of the Government)

HERMAN J. GALLOWAY [2]

[1] Appointed to succeed Judges Moss and Sinnott who died, respectively, June 11 and July 20, 1929. Judges Littleton and Williams took the oath of office and entered upon their several duties November 11, 1929.

[2] Resigned, effective at the close of December 31, 1929.

COMMISSIONERS

(Act of February 24, 1925, 43 Stat. 964; act of January 11, 1928, 45 Stat. 51)

ISRAEL M. FOSTER, of Ohio.
JOHN M. LEWIS, of Indiana.
JOHN A. ELMORE, of Alabama.
RICHARD S. WHALEY, of South Carolina.
MYRON M. COHEN, of Iowa.
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PROCEEDINGS ON THE DEATHS OF JUDGE McKENZIE MOSS AND JUDGE NICHOLAS J. SINNOTT

Pursuant to order of October 14, 1929, the court met on November 18, 1929, for appropriate services commemorative of the life and character of Judge McKenzie Moss, who died June 11, 1929, and of Judge Nicholas J. Sinnott, who died July 20, 1929.

The Honorable Herman J. Galloway, Assistant Attorney General of the United States, opened the proceedings with the following presentation and address to the court:

May it please the court:

I desire to present to the court the following memorial and resolutions on behalf of the bar of the Court of Claims:

"Honorable McKenzie Moss died in the city of Washington on the eleventh day of June, 1929, after a service of over three years as a judge of the Court of Claims, having served with distinction in various important capacities in the government of both his State and the Nation. When he was quite young he served his country in the Railway Mail Service. He then studied law and became a member of the bar in the State of Kentucky. After a successful practice of law he became a member of the Fifty-seventh Congress. Returning to his native State he was later elected judge of the Eighth Judicial District of Kentucky, in which capacity he continued until appointed assistant general counsel of the Alien Property Custodian in Washington. He was later made general counsel of the Alien Property Custodian and following this was appointed Deputy Commissioner of Internal Revenue from which position he was appointed Assistant Secretary of the Treasury. President Coolidge, in further recognition of his abilities and services to the public, nominated him as a judge of this court, and he entered upon his duties as such on June 7, 1926.

"In addition to his outstanding abilities, Judge Moss was known for the pleasant manner in which he treated everyone with whom he came in contact.

"Honorable Nicholas J. Sinnott died in the city of Washington on July 20, 1929, having served a little over a year as

a judge of the Court of Claims. Judge Sinnott also had a long and distinguished career of public service, in which he, too, served both his State and his Nation. Early in life he became a member of the bar. His first public service was as a member of the Oregon State Senate. Thereafter he was elected seven successive times as a Representative of the people of the State of Oregon in the National Congress, in which capacity he continued until he became a judge of the Court of Claims on April 20, 1928, having been appointed by President Coolidge. In all of these important positions of honor and trust Judge Sinnott served with great distinction.

"The bar of the Court of Claims recognizes in the death of Judge Moss and Judge Sinnott the loss of earnest, devoted citizens and public officials, and of learned, untiring, and impartial judges.

"Be it, therefore, resolved by the bar of the Court of Claims that the bar of the Court of Claims has learned with deep regret of the death of the Honorable McKenzie Moss and the Honorable Nicholas J. Sinnott. They had long and distinguished careers in public service. Their abilities and worth were recognized by the people of their own respective States and by the President of the United States when they were selected to fill the various places of trust which they occupied in such a creditable manner. Both of these jurists were untiring in their efforts to administer justice and to arrive at the truth. Both had personalities which made it a pleasure for the members of the bar to appear before them. In their death a great loss has been sustained, not only by their respective families and the communities in which they lived, but also by their country, by this court, the bench, and the bar.

"Be it further resolved that the foregoing memorial and resolutions be presented to the Court of Claims with the request that they be spread upon the minutes of the court; that a copy thereof be sent to the families of the deceased; and that upon presentation of the same to the Court of Claims the members of the bar unite in a suitable expression of their feelings on the death of Judge Moss and Judge Sinnott."

It is my further desire at this time to attempt to express on behalf of myself and my associates in the defense of the Government in cases before the Court of Claims the profound sorrow which filled our hearts when we learned of the death of Judge Moss and Judge Sinnott. It had not been our pleasure or privilege to have an extended or close acquaintance with either of them prior to the time they became judges of this court, but it took only a short time for

them to win our complete admiration. No official position was necessary for them to command our utmost respect. Their abilities and personalities alone demanded it. Their untiring zeal in their efforts to see that complete justice was done in every case was an inspiration to all of us. We felt that if we could fully inform the court of the facts involved in our cases these judges would make great contributions in arriving at a proper result.

Great as were the abilities of Judge Moss and Judge Sinnott, the trait of human kindness with which each was so generously endowed characterized their every act. Not only was it present in their private lives but it was also present in a marked degree while they were on the bench. Even a perhaps far-fetched theory was kindly treated and given full consideration by them. They had nothing but kindness and courtesy for counsel who appeared before them. These acts materially lightened the load of tasks which otherwise might have become only burdens. They greatly helped to make it truly a pleasure to appear before them.

The loss in the death of such distinguished jurists is great, but when such jurists have the personalities of Judge Moss and Judge Sinnott, the loss seems well-nigh irreparable.

Mr. Levi Cooke thereupon addressed the court, as follows:

We are gathered here to commemorate the life and services of a judge. An occasion of this sort brings to us a lively realization of the obligations of our profession and the activities of those men who at the bar and on the bench have held well to their duties and whose accomplishments are a reward alike to their colleagues, to their brothers, and to themselves. To-day we commemorate the life and services of the Honorable McKenzie Moss, whose last years were spent as a judge upon the bench of the Court of Claims of the United States, a tribunal second only to that highest court in all the world, and a tribunal to which the Congress of the United States has assigned the high functioning of awarding justice as between the Government of the United States and those petitioning against it.

Judge Moss ascended this bench peculiarly fitted by his earlier experience to render the high judicial service demanded of the judges here. He came of stock and from a country which have furnished men of sound character, rugged industry, and high conscience of duty to the public service of their locality and of the Nation. McKenzie Moss was of that Scotch-Irish origin which sent its men and women to the colonies of the seaboard, whence some of them and their descendants made their pioneer way over the mountains and into the basin of the Ohio River Valley to establish the settlements that made possible the conquest of a

continent. Born in Kentucky, Judge Moss was typical of his people and of his country. Educated to the bar, his early professional experience at Bowling Green and in his home circuit gave to him that understanding of court, client, and case which is the fundamental of the sound lawyer either at the chancel or on the bench.

His high abilities acknowledged by his neighbors, McKenzie Moss was elected a member of the House of Representatives in the Congress of the United States. He was then made circuit judge of the eighth judicial district of the Commonwealth of Kentucky. Following years of service as circuit judge, he resigned that bench to become general counsel to the Alien Property Custodian of the United States; became Deputy Commissioner of Internal Revenue; was appointed Assistant Secretary of the Treasury, and left that office to ascend this high bench as a judge of the Court of Claims of the United States. The mere record of the public duties confided by his own neighbors and by the Nation discloses the breadth of his experience and the progressive accomplishments of his public career, all ending here where we are gathered to-day.

Our system of national government shows three great branches to which the people have entrusted their public business, each sole within itself, yet interconnected and each dependent upon the fair functions of the other two. Our Constitution gives to us the legislative, the executive, and the judicial branches of our Government. Judge Moss served in the three branches. As a Representative in the Congress of the United States, he participated in and understood the field of legislation. As counsel to the Alien Property Custodian, he dealt with the great business of that office following the war. As Deputy Commissioner of Internal Revenue he supervised the tax collections of the Government. As Assistant Secretary of the Treasury, he held the seals of high office in one of the great executive departments of the public administration. In the fullness of his experience he was appointed by the President of the United States to become a judge of this court. Thus, he served in each of the great branches of our Government—in the legislative, in the executive, and in the judicial.

Upon what does our system both for the Government and for the people finally depend? It may well be said that the dependence is upon adherence to the Constitution; that the legislature shall, with its best sense of policy, exercise its powers and pass the laws for the people in compliance therewith; that the executive shall administer the laws accurately and within its limitation; and that the judiciary in the exercise of truly judicial discretion shall fathfully ad-

minister justice as it finds justice to be within the Constitution.

All sound government is based upon the notion that discretion in public officers must be limited, so far as possible, that the citizen or subject may know when an officer acts that his function is based upon law and not upon the exercise of impulse or individual assumption; yet discretion and judgment must occur if government is to continue, and under our system of civil administration this exercise of discretion is treated as judicial and is left to the judges appointed for its exercise.

Lawyers at the bar, I feel warranted in stating, have a sense of personal loss when they see one of their number sent to the bench. The brotherly relationship previously existing then in a way ends. The lawyer has left the bar to ascend the bench; to have reposed in him the exercise of the judicial discretion; to hold the final word within his jurisdiction in the disposal of justice. Under our philosophy the judge is set apart and above, there to perform the judicial office. He is there to perform the most sacred necessity in a peaceful government of laws amongst a free people. Judge McKenzie Moss understood these things. We of the bar parted with him as a lawyer when he ascended this bench. Here to-day we are privileged to join with his colleagues of the bench in honoring him as a lawyer and as a judge.

He became a member of a court holding judgment as between the United States and its citizens. No cause was so vast and no case was so small as on the one hand to affect his judgment and reason or on the other hand to fail of his constant and faithful consideration. To him the rights of the Government and the just merits of a complainant's petition were alike. He held the even balance between the great and the small, the rich and the poor, the known and the unknown, and most important of all, between his own sovereign and its subjects. We meet to celebrate the career and to mourn the death of the Honorable McKenzie Moss.

A sound lawyer and a great and honorable judge has passed.

The Honorable Robert Reyburn Butler, United States Representative from the second congressional district of Oregon, then spoke as follows:

I feel honored by this opportunity of saying a few words in tribute to the life and character of an old friend and neighbor and a distinguished and lamented public servant.

This year marked the seventieth anniversary of the admission of the great State of Oregon to statehood; and during those eventful years that State has made creditable contribu-

tions to the different departments and branches of the Federal Government—in the Congress, the Cabinet, and judiciary. Among all her distinguished sons none has been more faithful or honorable or brought to the discharge of their trusts a higher sense of public duty than Nicholas J. Sinnott.

He was born at The Dalles, Wasco County, Oregon, of pioneer Irish parents who had joined in the long trek across the Plains, on the 6th day of December, 1870, and attended the public schools and Wasco Independent Academy, and graduated from the University of Notre Dame in 1892. Soon after graduation he commenced the study of law in his home town in the office of Judge Alfred S. Bennett, one of the most distinguished lawyers of the Northwest, and was admitted to the bar in 1895, and immediately commenced the practice, and soon formed a partnership with his preceptor, Judge Bennett, which continued until his election to Congress in 1912. The firm of Bennett and Sinnott enjoyed a large practice, and much important litigation was successfully handled by that firm.

Judge Sinnott was elected to the State Senate of Oregon in 1908 and served through two sessions of that body, and during his service there was industrious and faithful and strove to advance such legislation as would best promote the welfare of the State and the happiness of its people.

For fifteen years he represented the second district of Oregon in Congress, commencing with the Sixty-third Congress. The district was then, as now, of vast territorial extent, embracing over 60,000 square miles, and with a great diversity of problems and interests touching and relating to the Federal Government and its many bureaus. During those years he served upon the Committees on the Public Lands and Irrigation and Reclamation and mastered the laws governing the public domain and the subject of reclamation. He ever strove to lighten the burdens of those who were endeavoring to establish homes on the public domain in the face of great difficulties, and whose hardships he knew. He reached a commanding position in the House of Representatives, and when he voluntarily retired no man there was more highly esteemed or more generally beloved. As his immediate successor, both in the Senate of Oregon and in the Congress of the United States, I came to know the high character of service which he rendered and the high mark he set, toward which all of his successors will have to aim and strive.

When he was called from his legislative labors to service upon this high court he was equipped by training and education, experience and learning, temperament and character. As a lawyer he was studious, able, careful, patient, diligent, and honorable, and those characteristics he carried with him

to the discharge of his duties as a member of this court, together with a loyalty to the law and a great sense of justice; and during the short period of time he served on this court he manifested the same high ability and patience, honor, and fidelity which had characterized his other public labors.

For more than twenty years he occupied public positions where the fierce glare was always turned upon him and where in his case, as in the case of every man who is called upon to serve the public, his every act was subjected to the closest and most pitiless scrutiny, but the searchlight which was turned upon his career has revealed no unworthy act, no blight, no stain.

It was with pleasing anticipations and high hopes that he faced the future. With a happy home, high position, ripened intellect and congenial labor, countless friends and universal respect and esteem, well, indeed, may he have looked forward to long and useful service and many happy years.

But just when hopes are brightest, prospects fairest, and fondest dreams are forming, it too often happens, it seems, that when least expected, like a sudden storm when skies are bluest, man's hopes are blighted, prospects clouded, and dreams vanish into nothingness. Why it is we know not, for these are some of the unsolved problems which it is not given us to solve—some of the inscrutable mysteries which it is not given us to penetrate, for now "we look through a glass darkly, then face to face."

So many qualities entered into the life and character of Nicholas J. Sinnott that it is difficult to point out his outstanding characteristics or predominant virtue. But aside from the fact that nature endowed him with a powerful physique—which was undermined by long years of strain and public labor—and high intellectual powers which were developed by study, training, and experience, he possessed courage of a high order, an unquestioned honesty, infinite patience, a kindly spirit, a sense of humor, which is a sense of proportion, loyalty to friends, and a fidelity under all the circumstances of life which remained unshaken. He was faithful.

Indeed he took unto himself the precept of Polonius:

> * * * to thine own self be true;
> And it must follow, as the night the day,
> Thou canst not then be false to any man.

During his long years of service in Congress it was his annual custom to return home and mingle with old friends and people whom he represented. This year he did not so return, but was borne there and laid to rest in the beautiful cemetery among those whom he loved—and lost a while—

within the shadow of old Mount Hood, upon whose snow-clad summit, glittering in the sunlight, he had gazed since childhood, and within sight and sound of the mighty river which he loved, and where the breezes from the western ocean will sing sweet requiems as they bear away the fragrance of the flowers which will bloom above his grave, while his memory will be cherished as long as Oregonians love their State and take pride in the noble achievements of their worthy sons.

Mr. George A. King delivered the following:

An occasion like this takes on added sadness when two lives of distinguished men are cut short before attaining the full measure ordinarily to be expected in our day.

The Psalmist said some thousands of years ago that the days of man are three score years and ten. True, he admits that they may be prolonged to four score, but if I understand him correctly he considers that to attain such an advanced age is only vanity.

Could he revisit the earth at the present day he might revise his opinion. We see four judges of the highest court in the land vigorously working at the age of more than three score years and ten, and one of them shortly to enter on his ninetieth year.

One of the two judges whose loss we mourn to-day had barely exceeded sixty years, while the other fell short of even that moderate age.

Two things they had in common. Each was identified with one State—Judge Moss with Kentucky, Judge Sinnott with Oregon. Both were sent to the halls of the National Legislature by those who best knew them, their neighbors who had followed their careers from birth upward.

Judge Sinnott lived all his life at his native place, The Dalles, Oregon, and served many terms in Congress from the congressional district of which that city is a part.

Judge Moss was also a Representative in Congress from a district not far removed from the county of his birth.

They are thus shown to have been held in the highest estimation by those who had the best opportunity to judge of their worth.

Judge Moss became a judge of this court June 14, 1926, and Judge Sinnott May 31, 1928. The former had three years' judicial service, the other one year. Both of them performed their full share of the work of this court. Judge Sinnott in his one year of judicial service announced the opinion of the court in no less than twenty-three cases and took his full share of the work in the decision of others. Judge Moss's opinions run through volumes 62 to 67, inclusive, of the Court of Claims Reports.

Judge Moss was a most charming gentleman and delightful companion. Judge Sinnott is known by his friends to have been equally so, though his service here was so short that I can say little of him from personal acquaintance. Perhaps a review of some of their more important decisions in this court will be the best contribution I can make to a right appraisement of their judicial life and labors.

Some of the more important opinions of Judge Moss are the following:

Spreckles, 63 C. Cls. 64, a question of war requisition complicated with that of repair.

Lynch, 63 C. Cls. 91, a construction of legislation relative to flying pay, particularly as to whether the right could be affected by regulations made after the performance of the services.

Remington Arms Co., 63 C. Cls. 544, involved a complicated question of settlement of munitions contract made during the World War.

California Wine Association, 65 C. Cls. 7. Compromise of criminal case will not be set aside because of mistakes of law in making it.

Morrow, 65 C. Cls. 35, medical officer, U. S. Navy, not entitled to reimbursement for expenses at civilian hospital.

Heid Brothers, 65 C. Cls. 87, Government can not recover on counterclaim for coal furnished under a previous contract and complained of as not being up to specifications.

Asiatic Petroleum Co., 65 C. Cls. 100. A contract for oil for use of the U. S. Government in the Philippines to be delivered c. i. f. Cavite does not require the contractor to pay tariff duties in the Philippines, both because under such contracts the contractor is only chargeable with costs, insurance, and freight and because supplies for the Government are in no event subject to customs duties imposed by the Philippine Government.

Curtis, 65 C. Cls. 139, 186, involving compensation for land taken which includes consequential damages to other land of the same owner when taken.

Hoffman, Huisking, Lasher, 65 C. Cls. 238, 260, 295, tax cases, the last allowing interest on refund made by commissioner but disallowed by him on the ground claim was not in proper form.

Tignor, 65 C. Cls. 321. Oyster beds, with oysters thereon and other personal property all to be included in determining compensation for land.

Libby, 65 C. Cls. 341, meat packers' claim allowed, with expression of regret that the court could not allow interest.

Walker Manufacturing Co., 65 C. Cls. 394, tax case involving automobile accessories.

Yankton Sioux Indians, 65 C. Cls. 427. Allowance for value of land based on Supreme Court mandate.

New York Shipbuilding Co., 65 C. Cls. 457. Contract for increased price of labor under a previous fixed price contract is valid.

Dyer & Co.; Shofstall Hay & Grain Co., 65 C. Cls. 612, 653. Verbal contract of purchase confirmed by formal orders valid.

Weehawken Dry Dock Co., 65 C. Cls. 662, 672, 686. Where the Government fails to furnish materials and supplies required and promptly approves the plans and fails to remove a vessel which stood in the way of the contractor's working, liquidated damages can not be withheld and the contractor is also entitled to damages for delays and interferences.

Faculty Club, 65 C. Cls. 754. A club of professors, etc., of the University of California constitutes a social club and is not exempt from taxation on the ground of being formed only for scientific purposes.

Hugger, 66 C. Cls. 97. Where a cost-plus contract requires a contractor to make payment to a subcontractor only on authority of the construction division of the Army, the contractor is not obliged to make such payment until such approval is given, and if he pays beforehand his claim against the Government does not arise until the construction division gives its approval and the statute of limitations runs only from that date.

DeCourt, 66 C. Cls. 130. Captain Philippine Scouts, no retroactive construction.

Hoopes & Townsend, 66 C. Cls. 142. Cancellation of contract.

Wharton & Northern R. R. Co., 66 C. Cls. 205. Special workmen's train put on for benefit of Government.

Fox Company, 66 C. Cls. 447. Tax case. Corporation not entitled to benefit of exemption of corporations doing business on only a nominal capital where capital is substantial.

Hamlin, 66 C. Cls. 501. Tax case. Power to appoint by will where given by will of first decedent is not a part of the estate of the appointee where he dies before the original testator.

Frazier, 66 C. Cls. 545. Retired officers and enlisted men not required to deduct retired pay from Panama Canal salaries.

Atlantic Coast Line, 66 C. Cls. 576. A claim for transportation for military service without a formal contract accrues immediately on rendition of service and is barred if not sued on within six years thereafter.

Clinchfield Navigation Co., 66 C. Cls. 589. Tax case. Taxpayer may use calendar year as basis, even though there is a parent company using the year ending June 30th.

Ponce & Guayama R. R. Co., 66 C. Cls. 596. Tax case. Taxes paid the Porto Rican government can not be deducted.

Johnstown Coal & Coke Co., 66 C. Cls. 616. Contract for estimated quantity of coal according to actual requirements of the service constitutes a requirements contract, especially when accompanied by an estimate of the amount required. If the Government takes less than the estimated and required quantity it is liable to profits on the difference.

Sweet, 66 C. Cls. 654. Contributions for religious, charitable, etc., purposes not deductible in returns of corporation, nor are such deductions allowable under the guise of "ordinary and necessary expenses," although the corporation was benefited by such contributions.

National Candy Co., 67 C. Cls. 74. Where two companies are so closely affiliated, one company owning 94.33% of the stock of the other, they constitute in effect one company, and the Internal Revenue Office was right in requiring their return to be treated as coming from one company and not as two separate companies.

Ullman Manufacturing Co., 67 C. Cls. 104. Where two companies are affiliated to such an extent that they are practically identical and controlled by the same interests, they are entitled to make a single consolidated return, and as this results in the instant case in showing overassessment they are entitled to a judgment for the difference.

Arthur N. Brown, 67 C. Cls. 172. Appointment of a civilian professor at Naval Academy is an appointment to office and may be terminated at any time by the appointing power.

Arrowhead Springs Co., 67 C. Cls. 211. Where a commissioner in a case involving damages to leased premises holds the hearings on the premises with the advantage afforded by personal contact with the witnesses and personal inspection of the particular items of property which are the subject of controversy, his opinion is entitled to great weight.

In a lease requiring the United States to leave the property in the same shape and condition as at the time the Government took possession thereof, ordinary wear and tear and damage by fire or other casualty excepted, the Government is liable for the expense of restoring the buildings and grounds as well as the furniture and fixtures to their original condition, but not for damages resulting from a fire of uncertain origin.

Walbach, 67 C. Cls. 239. Army officer entitled to rental and subsistence allowance in right of a dependent mother

when he contributed to her support, although she also gets from $600 to $700 a year from ground rents.

Southern Pacific Co., 67 C. Cls. 414. Claim for railroad transportation accrues when the services are rendered. Not being sued on within six years of rendition of services, it is barred by limitations.

Overlander, 67 C. Cls. 531. Taxpayer entitled to correction of overassessment of real estate tax based on overvaluation of real property by Internal Revenue Office. Principally question of fact.

Matthiessen, 67 C. Cls. 571. Where a party received property under a bequest, the tax upon which is paid by the executor, the legatee is not entitled in computing his income tax to a deduction as for taxes paid or accrued within the taxable year, on the ground that the estate tax is imposed by authority of the United States, and is paid by the executor and is not a tax paid by the legatee. Claim rejected.

Guettel, 67 C. Cls. 613. Tax case. Tax on proceeds of life-insurance policies payable to beneficiary other than decedent or his estate is valid as to two policies on the life of the decedent, but as to the third, which was assigned by the decedent to his wife and held by her in her own right at the time of his death, no tax could be imposed.

Semmes Motor Co., 67 C. Cls. 631. Tax case. A protest addressed to the Commissioner of Internal Revenue against an additional assessment does not constitute a claim for refund, and unless application for refund was made within the time limited by law the conditions as to such application are not complied with.

Abraham M. Ellis, 68 C. Cls. 11. Where a party buys surplus property for immediate delivery and resale, the purchaser is entitled to the property as described and has the right to rescind the contract if the property does not correspond to the description in the catalogue or if the Government fails to comply promptly with the terms of sale.

Lindsay, 69 C. Cls. —. Contractor delivered lumber at Jacksonville, Florida, to the Fleet Corporation for shipment to Cuba. Cuba declared a moratorium, and the Fleet Corporation refused to take the lumber, though then actually on the Jacksonville dock. *Held*, that the Government was obliged to take all lumber on the dock and was liable for the profits that would have been made by the contractor.

Of the decisions of Judge Sinnott I mention particularly the following:

Wells Manufacturing Co., 66 C. Cls. 283. Failure to file bond not fatal.

Milwaukee Motor Products, 66 C. Cls. 295. Timers not taxable as automobile accessories when they can be applied to engines other than those of automobiles.

Kreamer, 66 C. Cls. 308. Fair salaries to officers deductible from corporation tax even though those officers own nearly all of the stock.

Sloan Danenhower & Co., 66 C. Cls. 561. When a Government's ship captain engages a contractor to take a vessel off the rocks a mere conversation to that effect has no binding force against the Government, but if the department confirms the agreement the salvor is entitled to compensation for salvage but not for subsequent service in stripping the vessel of its apparel and delivering the same to the officers of the Government.

Kaltenbach, 66 C. Cls. 581. Tax case. Taxpayer not entitled to any allowance for use of secret process of invention.

Abbott, 66 C. Cls. 603. The Bohemian Club of San Francisco is a social club and can not claim exemption of clubs primarily organized for intellectual purposes.

Maryland Dredging & Contracting Co., 66 C. Cls. 627. A contractor for dredging is entitled to slope dredging, meals furnished Government employees, deductions for inspection and superintendence where these items are allowed by the contracting officer but is not entitled to recover for ledge rock excavation where the contracting officer decided against it, particularly where it appears from the evidence that the material was not ledge rock as defined in the specifications but such material as could be carried away to a dumping ground through a 20-inch suction pipe.

James Clark Distilling Co., 66 C. Cls. 726. Tax case. A profit made on the sale of whiskey just before prohibition went into effect and caused by its approach constitutes income and is properly taxable. Claim rejected.

Riverside Manufacturing Co., 67 C. Cls. 117. Tax case. Question whether market quotations used as a basis of fixing inventory values in market should be reduced by trade discounts and selling commissions. Case referred to commissioner for findings and report to the court of the facts. No exceptions were filed by either party but the court examined the evidence before adopting the findings of the commissioner. *Held*, that the statute left the basis of the inventories to the judgment of the commissioner and that a regulation excluding the discounts and commissions referred to was valid. Claim rejected.

Harrisburg Pipe & Pipe Bending Co., 67 C. Cls. 138. On Navy Department contract for lawful cancellation under act of June 15, 1917, contractor is entitled to be reimbursed for its expenditures with interest thereon.

Berg Brothers Co., 67 C. Cls. 165. Timers for Ford internal-combustion engines used on Ford automobiles and tractors but also capable of being used on all sorts of in-

ternal-combustion engines for power plants, concrete mixers, etc., not taxable as automobile accessories.

Cecil, 67 C. Cls. 398. When real property is leased to the Government under a provision in the lease that the lessee shall remove all railroad tracks and structures placed thereon, the Government is liable for damages for not removing the embankment or the macadam road of the roadbed upon which the tracks had been laid.

Dick Brothers, 67 C. Cls. 505. Losses sustained by manufacturers of beer owing to approach of prohibition are not deductible as loss of good will or on any other ground.

George W. Allen, 67 C. Cls. 558. Commissioned officer who was on July 1, 1922, a warrant officer and got his commission as ensign later is not within the class of officers in the service on June 30, 1922, but among those commissioned afterwards and can count only commissioned service.

Utah Power & Light Co., 67 C. Cls. 602. Suit to recover back rentals paid for land situated in national forest, it having been subsequently decided by the District Court and the Circuit Court of Appeals that the company had acquired a vested right of way and therefore no rental was due and also that Congress had provided by act of 1907 that such moneys should be refunded. Important question as to statute of limitations involved as most of the claim arose more than six years after the alleged rental payments were made. Application had to be made to the Secretary of Agriculture and acted on by him before suit could be brought; suit having been brought within six years of the time of rejection was held in time.

Alpha Portland Cement Co., 67 C. Cls. 680. Tax case. Where in the selling of cement the company was liable to refund for the value of the bags when returned, it was entitled to a deductible credit on its liability of the value of the bags.

Russian Volunteer Fleet, 68 C. Cls. 32. Soviet Government not recognized by United States, and therefore a citizen of that country can not sue the United States under section 155 of the Judicial Code.

Utica Knitting Co., 68 C. Cls. 77. Tax case. Intercompany transactions between the principal company and its affiliated company can not be used as a basis for a deductible loss. Claim rejected.

Sweet, 68 C. Cls. 109. Tax case. In the case of a corporation claiming to have little or no invested capital, but which actually had the substantial sum of $32,500 invested in the business of buying and selling horses and mules, it could not claim the benefit of the lower rates imposed by law on corporations having no invested capital or only a nominal sum.

Edelmann & Co., 68 C. Cls. 168. Window antirattlers and clocks used exclusively on automobiles are automobile accessories and properly taxable as such.

Latham, 68 C. Cls. 201. When a contract requires the contractor to erect certain structures "on foundations now under construction," etc., he can not be charged with liquidated damages during the time of the construction of the foundations upon which he is to work when delayed by the action of the Government or of some other contractor with the Government.

Warner-Patterson Co., 68 C. Cls. 237. A tax on a manufacturer of certain articles is properly imposed on one for whose trade use the article is made, notwithstanding he may not be himself the actual manufacturer of the article.

Boush Creek Land Corporation, 68 C. Cls. 56. Dredging operations of the United States dumped a large quantity of mud and silt into the headwaters of Boush Creek, impaired the natural drainage of plaintiff's land, reduced the ebb and flow of the tide, and interfered with navigation as well as with plaintiff's access to the creek and its adjacent land; also caused a deposit of mud and silt on the land. Damages in the sum of $11,600 awarded.

This widespread variety of questions passed upon in opinions announced by the two judges whom we are commemorating shows the great diversity of contacts between the Government and its citizens in business affairs. Contractors of all classes with the Government, officers claiming the emoluments of their office of which they regard themselves as being deprived by rulings of various executive branches, taxpayers raising questions of the meaning of the taxing statutes, and owners of land or interests therein appropriated for public purposes all come to this court and have their rights carefully passed upon after consideration by this court of the best arguments that can be adduced by counsel on the respective sides.

Remarks by members of the bar were concluded by Mr. John F. McCarron, as follows:

Judge Sinnott has passed to his eternal reward. He has gone to stand before a judge whose judgments are not those of men. It was my pleasure to have known Judge Sinnott from shortly after his coming to Washington as a Member of the House of Representatives from the State of Oregon. He served with honor and distinction as a Member of that body and was signally honored by his colleagues, for at the time of his retirement from the House of Representatives he was the chairman of one of its largest and most responsible committees.

A native son of the West, he possessed in all their fullness the outstanding attributes of a true son of that great section of our America. Frank, honorable, warm-hearted, and sympathetic, he emphasized these in a manner that made for him an affection in the hearts of those who best know him.

A gentleman of culture and a scholar made him a worthy son of his alma mater, the great University of Notre Dame. Judge Sinnott was a practical Christian who firmly believed in the tenets of the faith he loved and practiced. His was an abiding faith in Him who doth all things well. At the time of his last illness he had gone to a quiet spot to meditate with his God, little realizing that in a short time he would receive the summons from Him whom he loved and served.

Judge Sinnott was a member of this court for only a very short period, but he leaves an honored name to the roll of those who have served on this bench and as one who was true to the high ideals of his profession. May his soul rest in peace.

To the foregoing addresses the Honorable Fenton W. Booth, Chief Justice, responded as follows:

Members of the bar and ladies and gentlemen:

So many factors enter into the achievement of success that it is difficult to segregate them and ascribe to a career the one or the other. With a settled degree of certainty it may be said that character, ability, and industry are essential, especially for the judicial office, whose exacting duties demand impartiality, tireless labor, and the settlement of rights. It is continuously asserted and often emphasized that the possession of judicial temperament typifies a good judge. To divorce one's self from all conscious prejudice is perhaps not difficult. To overcome one's unconscious convictions and natural inclinations involves a task; and if judicial temperament embraces each and both processes we may with safety grant that the ability so to do is an essential accomplishment of a good judge.

Judge McKenzie Moss and Judge Nicholas J. Sinnott, whose memory we honor to-day, met the exacting requirements of the profession, and leave to those of us who survive lasting memories of character, industry, ability, and judicial temperament. Judge Moss was born and reared in Kentucky, and it was there, in his native State, amidst the association and companionships of those who knew him best, he laid firmly the foundation for future advancements. Admitted to the bar in 1896, he in a comparatively short period of time established an enviable reputation as a lawyer, leading in rapid succession to a term in Congress, two elections as judge of the eighth judicial circuit, an attorneyship with

the Alien Property Custodian, Assistant Secretary of the Treasury, and at last the premature closing of his career as an associate judge of this court. He was our associate for three years. What he accomplished is stamped indelibly upon the records of this court. Of the various offices it was his lot to occupy, the judicial office was to him the most congenial. Its duties and responsibilities appealed to his disposition and attainments, and often he said, "I am so happy here. I am so contented. I dearly love this work." As a man he was most lovable and kindly. Toward his associates he constantly displayed a personal interest and personal concern that emanates alone from true friendship. Never exhibiting temper or impatience, he took his place by our sides and uncomplainingly assumed his full share of our tasks, discharging his duties in an atmosphere of pleasantness, not infrequently mixed with wholesome good humor and jovialness, which characterized his whole life.

The Warren Bar Association, of Bowling Green, Kentucky, assembled a few days after his funeral, paid Judge Moss this splendid tribute: "He was a man of unusual talent and ability, which his public life and official record attest. His spirit was gentle, his disposition kind, his manner gentlemanly and courtly, his bearing manly, his association a benediction to those fortunate in its enjoyment. He was unfailing in kindness and courtesy to lawyer and litigant and helpful and patient to all mankind of whatever station in life."

Judge Nicholas J. Sinnott assumed his place on this bench May 31, 1928, and within the brief period of a few months in excess of a year demonstrated his worth and his distinguished abilities. As a judge possessed of an unusual alertness of mind, he grasped almost at once the *sui generis* procedure of the court and with remarkable facility of expression and clearness of argument delivered opinions in important cases within a brief space of time. Judge Sinnott came to us following important activities and distinguished services at the bar and in politics, having been signally honored by his home folks by repeated election to important offices in his native State and the Nation. Unconscious of physical weakness, with almost incredible confidence in the stability of a rugged physique and years of excellent health, Judge Sinnott could not bring himself to believe that he was ill. Despite repeated warnings to rest and temporarily retire from the court's labor, he persisted in his tireless industry and to the very last continued to perform his tasks. The judicial office, while new to him, appealed to his ambition. He found it to his liking, and in simple justice it must be said that for him the future portended brilliant accomplishments and the con-

summation of a reputation as a jurist resting upon a permanent foundation.

The careers of Judge Sinnott and Judge Moss were in most respects alike. Though born in widely separated sections of the country, and reared amidst surroundings and in an atmosphere quite distinct, both overcame the handicaps of early struggles for recognition and advancement, and went forward gaining and retaining the affection and esteem of all with whom they came in contact. In disposition and temperament both were the same. In kindliness of heart, in patience and good temper, in sympathy and admiration for the race, in consciousness of responsibility to correct manhood, no man excelled Judge Sinnott. The bond of friendship between Judge Moss and Judge Sinnott was intimate and affectionate. The two men loved each other; they were fast and congenial friends. Judge Moss's illness caused Judge Sinnott deep concern and anxiety, and those of us who daily observed Judge Sinnott knew full well the effect of his good friend's passing upon his own impaired and precarious health, and fate decreed that they should pass on almost together.

Intimate association and daily contacts of men engaged in important and confidential labor generates either lasting and true friendships or permanent distrust. Speaking for the court, it is a pronounced pleasure to say that our relationship with Judge Moss and Judge Sinnott will never bring to us aught else but happy and fond memories of two true friends, whose lives we admired and whose names we will forever venerate.

As a further mark of respect to the memory of the late judges the court was ordered adjourned for the day.

CASES DECIDED

IN

THE COURT OF CLAIMS

JUNE 1, 1929, TO JANUARY 31, 1930

AMERICAN MOLASSES COMPANY OF NEW YORK v. THE UNITED STATES

[No. H-45. Decided December 3, 1928[1]]

On the Proofs

Excess-profits tax; reorganization; exchange of shares; consolidated return; section 207, war revenue act of 1917; sections 326 (a) and 331, revenue act of 1918.—In case of a reorganization effected after March 3, 1917, by the exchange of shares of stock of one corporation for those of another, with no change of stockholders, the value of the stock surrendered is to be reckoned, in the ascertainment of consolidated invested capital for excess-profits tax purposes, under sections 207 of the revenue act of 1917 and 326 (a) and 331 of the revenue act of 1918, without increase, notwithstanding the total par value of the new shares was greater than of the shares surrendered. *United Cigar Stores of America* v. *United States*, 62 C. Cls. 134, distinguished.

The Reporter's statement of the case:

Messrs. M. Carter Hall and *Adrian C. Humphreys* for the plaintiff. *Carlin, Carlin & Hall* and *Stroock & Stroock* were on the briefs.

Mr. Dwight E. Rorer, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Messrs. C. M. Charest, J. R. Wheeler*, and *C. B. Lingamfelter* were on the briefs.

The court made special findings of fact, as follows:

I. The plaintiff, the American Molasses Company of New York, is a corporation organized and existing under the

[1] Motion for new trial overruled Mar. 3, 1930.

laws of the State of New York, with its office and principal place of business at 111 Wall Street, New York, engaged in the business of importing, exporting, and dealing in molasses and syrup.

II. On September 13, 1902, the American Molasses Company of New Jersey was organized, and, on August 31, 1903, issued its stock of a par value of $996,800 and bonds of a par value of $587,500, or an aggregate of $1,584,300, for stocks of the Boston Molasses Company, N. W. Taussig Company, and the Eastern Refining Company, having par value of $849,300, and subsequently issued additional stock of a par value of $3,200, making its aggregate stock and bond issue $1,587,500.

III. On August 18, 1905, plaintiff, the American Molasses Company of New York, was organized and thereupon issued its stock of a par value of $600,000 to the American Molasses Company of New Jersey for the entire capital stock of the N. W. Taussig Company of a par value of $300,000 and stock of the Eastern Refining Company of the par value of $300,000, or an aggregate par value of $600,000.

IV. On April 1, 1916, the American Molasses Company of New Jersey issued and sold for cash its preferred stock of a par value of $461,500. On July 1, 1916, the American Molasses Company of New Jersey, pursuant to the contract contained in the certificate of said preferred stock, required its conversion into common stock at the rate of ten (10) shares of common for every seven (7) shares of preferred, and in exchange for said preferred stock of a total par value of $461,500 issued its common stock of a total par value of $659,200.

V. On May 1, 1917, and as a result of the several transactions hereinbefore set forth, the American Molasses Company of New Jersey had outstanding common stock of the total par value of $1,659,200, which had been issued either for cash or tangible property.

VI. On April 10, 1917, at a special meeting of plaintiff's stockholders, the following resolutions were unanimously passed:

"*Resolved*, That this company proceed in the manner required by law to increase its capital stock to $3,500,000 and

to do all of the things necessary to invest itself with title of all of the assets, property, and effects of the American Molasses Company of New Jersey, and to acquire the same by the issuance of its stock at the rate of $200 par value of the American Molasses Company of New York stock for $100 of par value of stock of the American Molasses Company of New Jersey, and also to assume the obligations of the American Molasses Company of New Jersey and to offer to the stockholders of the American Molasses Company of New Jersey to exchange and purchase their respective holdings of stock in the manner above stated.

"*Resolved*, That in view of the special and increased taxes to which the company is and will be subjected and it is desirous that the capital stock of the company be readjusted for the purpose of acquiring from the stockholders of the American Molasses Company of New Jersey their respective holdings of the capital shares of the latter company, that the officers and directors of this company hereunto duly authorized pursuant to this resolution be directed, authorized, and empowered to increase the capital stock of this company to $3,500,000 and to issue or cause to be issued as many of the shares of this company as may be necessary for the purpose of acquiring all or any part of the stock of the American Molasses Company of New Jersey and all of the assets, property, and effects of the latter company, and that the officers and directors of this company after the same shall have been required to do all acts and things necessary and required by statute to reduce or cause to be reduced the capital stock of the New Jersey company to the minimum allowed by law, and that the directors and stockholders of this company forthwith proceed to carry out the ends and purposes of this resolution, as provided by law, and it is hereby declared by the stockholders of this company that each and every share of stock of the New Jersey company is worth, together with the property thereunder acquired, two shares of stock of this company, and that the stock of this company issued pursuant to this resolution shall be fully paid and non-assessable."

VII. On April 24, 1917, at a special meeting of plaintiff's board of directors, the president reported to the board that the plaintiff's stock had been duly increased as authorized under the resolution set forth in the preceding paragraph, and that pursuant to an arrangement between plaintiff and stockholders of the American Molasses Company of New Jersey, " all of the capital stock of the New Jersey company

had been acquired, together with all of the assets, property, and effects and subject to all of the liabilities, and that this company [plaintiff] was about to issue the necessary certificates of stock pursuant to the resolution and authority of the board of directors and stockholders, to the persons and their assigns thereto entitled."

VIII. On April 10, 1917, at a meeting of the directors of the American Molasses Company of New Jersey, the following resolution was passed:

"*Resolved*, That after such exchange shall have been made, this company proceed in the manner required by law to reduce its capital stock to the minimum allowed by law, to wit: $2,000, and that all of the property, assets, and effects be transferred to the American Molasses Company of New York upon consideration that the latter company assume all obligations of every kind, nature, and description of this corporation, and

"*It was further resolved*, That the officers of this company thereunto duly authorized by the by-laws and by law do every act and thing that may be necessary to carry out the true intent and purpose of this resolution."

IX. Pursuant to said resolution all of the property, assets, and effects of the American Molasses Company of New Jersey were transferred in May, 1917, to plaintiff.

X. On May 2, 1917, at a special meeting of the stockholders of the American Molasses Company of New Jersey, the necessary corporate action was authorized and all necessary action required by law was taken to reduce the capital stock of this company from $3,000,000 to $2,000.

XI. On May 1, 1917, and on July 1, 1917, and as a result of the several transactions hereinbefore set forth, plaintiff had issued and outstanding in the hands of the public its common stock of a par value of $3,318,400, all of which was issued for stock of the American Molasses Company of New Jersey of a par value of $1,659,200.

XII. On or about May 1, 1917, and at the time when plaintiff's stock was issued for the stock of the American Molasses Company of New Jersey, the stock of said last-named company had a fair market value of at least $200 per share.

XIII. On September 27, 1918, plaintiff filed with the collector of internal revenue for the second district of New

York its corporation income-tax return and its consolidated excess-profits tax return, both for the fiscal year ending June 30, 1918. Thereafter, and on or about June 12, 1919, a consolidated corporation income and profits tax return was filed by the plaintiff for itself and affiliated companies, to wit: Boston Molasses Company, Porto Rico Commercial Company, and American Molasses Company of Louisiana. Subsequently and on December 12, 1919, plaintiff filed with the collector of internal revenue for the second district of New York revised corporation income and profits tax returns for the said fiscal year ending June 30, 1918, for itself and its affiliated companies, to wit: Boston Molasses Company, Nulomoline Company, American Molasses Company of Louisiana, American Molasses Company of New Jersey, and Porto Rico Commercial Company.

XIV. Upon investigation and audit of the said income and profits tax returns and based upon adjustments of net income and invested capital, the Commissioner of Internal Revenue on June 8, 1925, finally determined the total tax liability of plaintiff and said affiliated companies for the fiscal year ending June 30, 1918, to be $633,662.74, all of which said tax was duly paid and allocated as follows:

American Molasses Co. of N. Y.	$570, 538. 01	90. 04%
Boston Molasses Company	22, 536. 21	3. 55%
The Nulomoline Company	40, 588. 52	6. 41%
Total	633, 662. 74	100. 00%

XV. The consolidated net income for said fiscal year subject to profits tax as finally computed by the Commissioner of Internal Revenue, the correctness of which is conceded by plaintiff, was—

For the fiscal year ending June 30, 1918 .... $1, 317, 758. 36

The total income tax due from plaintiff and its subsidiaries as finally determined and assessed by the said commissioner and paid by plaintiff and its subsidiaries, was—

American Molasses Co. of N. Y.	$58, 105. 47
Boston Molasses Company	2, 290. 92
The Nulomoline Company	4, 136. 56
	64, 532. 95

If the plaintiff's contention with respect to the computation of the invested capital of the consolidated group is correct, there would be due from the plaintiff and its affiliated companies on account of income tax for the fiscal year ending June 30, 1918, the additional sum of $17,740.70.

The consolidated invested capital as finally determined by said commissioner, the correctness of which is in issue in this case, was—

Fiscal year ending 6/30/18 under 1917 law	$3,150,350.62
Fiscal year ending 6/30/18 under 1918 law	3,147,786.16

and the total profits tax of the consolidated group, as finally determined and assessed by the said commissioner, was $569,129.79.

Plaintiff's proportionate part of said consolidated profits tax was fixed by agreement among the members of the consolidated group to be 90.04% thereof. There was assessed against and paid by plaintiff on this account the sum of $512,444.46, the correctness of which is in issue in this case.

XVI. In arriving at the consolidated invested capital of the plaintiff and its subsidiaries for the fiscal year ending June 30, 1918, the Commissioner of Internal Revenue computed said consolidated invested capital under the limitations of section 207 of the revenue act of 1917, and subsection 5 of section 326 (a) of the revenue act of 1918, by including in the invested capital for that portion of the fiscal year in 1917 and for that portion of the fiscal year in 1918 intangible assets acquired for stock to the extent of 20% and 25%, respectively, of the par value of the total outstanding stock of the plaintiff on March 3, 1917.

The consolidated surplus of the affiliated group of corporations as of July 1, 1917, was $2,603,844.63 and the true consolidated invested capital of the group, if computed in accordance with the plaintiff's contention, would be, under the revenue act of 1917, $5,632,524.62, and under the revenue act of 1918, $5,546,200.16.

If the plaintiff's contention as to the method of computing the invested capital of the consolidated group for the fiscal year ended June 30, 1918, is correct, the total income and excess-profits tax of the plaintiff and its affiliated com-

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panies for the fiscal year ended June 30, 1918, would be $451,630.18, divided as follows: Income tax, $82,275.65 (which includes the additional income tax of $17,740.70, referred to in Finding XV), and profits tax, $369,354.53, and the amount to be refunded to plaintiff in this proceeding would be $163,890.26, with interest from respective dates of payment to date of judgment. Plaintiff made payment of taxes for the fiscal year ending June 30, 1918, as follows:

1/21/26	$8, 133. 56
12/31/19	57, 477. 60
12/24/19	51, 308. 68
9/16/19	36, 408. 86
6/16/19	30, 406. 39
3/15/19	43, 011. 32
12/12/18	343, 791. 60
	570, 538. 01

XVII. Subsequent to all the payments of tax made by plaintiff hereinbefore referred to and within the time prescribed by law and by regulations of the Commissioner of Internal Revenue then in effect, plaintiff filed with the collector of internal revenue at New York, New York, a claim for refund of excess-profits taxes alleged to have been erroneously assessed against and collected from it for the fiscal year ending June 30, 1918, on account of alleged erroneous computation of its invested capital in the sum of $125,000 or such greater amount as was legally refundable, which claim was finally denied and rejected by said Commissioner of Internal Revenue on July 20, 1926, prior to the commencement of this suit.

The court decided that plaintiff was not entitled to recover.

Moss, *Judge*, delivered the opinion of the court:

This is an excess-profits tax case. It is plaintiff's contention that its consolidated invested capital for the fiscal year ending June 30, 1918, which is the subject of this controversy, should have been computed under the provisions of section 240 of the revenue act of 1918, 40 Stat. 1081, and in accord with the provisions of article 864 of Treasury Regulations 45 promulgated thereunder, "by adding to its entire out-

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standing common and preferred capital stock in the hands of the public, as of July 1, 1917, viz., $3,318,400, the consolidated surplus as of July 1, 1917, viz., $2,603,844.63, this total being subjected to minor accounting adjustments provided for under the regulations, so as to produce a consolidated invested capital for the group, under the revenue act of 1917, of $5,632,524.62, and under the revenue act of 1918, $5,546,200.16." It is shown that if plaintiff's invested capital should be computed according to this method, plaintiff has overpaid its taxes by the amount of $163,890.26.

In support of its contention as to the method of computing its invested capital, plaintiff relies upon the decision of this court in the case of *United Cigar Stores of America* v. *United States*, 62 C. Cls. 134. The facts in the case cited are briefly stated in the opinion as follows:

"In July, 1912, plaintiff issued its capital stock for the capital stock of Corporation of United Cigar Stores, which in 1909 had been issued for stock of the United Cigar Stores Co. of New Jersey.

"Upon the facts and the law applicable thereto, it must be held, in the computation of plaintiff's consolidated invested capital under section 207 of the revenue act of 1917, that $27,162,000 par value of its original common capital stock, was issued in 1912 in payment for tangible property consisting of capital stock of the Corporation of United Cigar Stores, the value of which is conceded to have been equal to the par value of plaintiff's common stock then issued."

As will presently be shown, the decision in the foregoing case is not applicable to the case under consideration. The transaction involved in the instant case was a reorganization of the American Molasses Company of New Jersey, and an exchange, in *May, 1917*, of the stock in same for the stock in the new organization, the American Molasses Company of New York. It was a mere exchange of two shares of the New York company, which had a par value of $3,318,400, for one share of the outstanding stock of the New Jersey company, which had a par value of $1,659,200. The stock of the plaintiff company was acquired, and thereafter held and controlled by the same individuals who had owned and held the stock of the New Jersey company.

Section 207 of the revenue act of 1917, 40 Stat. 300, reads as follows:

"That as used in this title, the term 'invested capital' for any year means the average invested capital for the year, as defined and limited in this title, averaged monthly.

* * * * * * *

"(a) In the case of a corporation or partnership: (1) Actual cash paid in, (2) the actual cash value of tangible property paid in other than cash for stock or shares in such corporation or partnership at the time of such payment (but in case such tangible property was paid in prior to January first, nineteen hundred and fourteen, the actual cash value of such property as of January first, nineteen hundred and fourteen, but in no case to exceed the par value of the original stock or shares specifically issued therefor), and (3) paid in or earned surplus and undivided profits used or employed in the business, exclusive of undivided profits earned during the taxable year: *Provided*, That (a) the actual cash value of patents and copyrights paid in for stocks or shares in such corporation or partnership, at the time of such payment, shall be included as invested capital, but not to exceed the par value of such stock or shares at the time of such payment and (b) the good will, trade-marks, trade brands, the franchise of a corporation or partnership, or other intangible property, shall be included as invested capital if the corporation or partnership made payment bona fide therefor specifically as such in cash or tangible property, the value of such good will, trade-mark, trade brand, franchise, or intangible property not to exceed the actual cash or actual cash value of the tangible property paid therefor at the time of such payment; but good will, trade-marks, trade brands, franchise of a corporation or partnership, or other intangible property, bona fide purchased prior to March third, nineteen hundred and seventeen, for and with interest or shares in a partnership or for and with shares in the capital stock of a corporation (issued prior to March third, nineteen hundred and seventeen), in an amount not to exceed on March third, nineteen hundred and seventeen, twenty per centum of the total interest or shares in the partnership or of the total shares of the capital stock of the corporation, shall be included in invested capital at a value not to exceed the actual cash value at the time of such purchase, and in case of issue of stock therefor not to exceed the par value of such stock * * *."

Section 331 of the act of 1918, 40 Stat. 1095, contains the following provision:

"In the case of the reorganization, consolidation, or change of ownership of a trade or business, or change of ownership of property, *after March 3, 1917*, if an interest or control in such trade or business or property of 50 per centum or more remains in the same persons, or any of them, then no asset transferred or received from the previous owner shall, for the purpose of determining invested capital, be allowed a greater value than would have been allowed under this title in computing the invested capital of such previous owner if such asset had not been so transferred or received: * * *."

(Our italics.) Section 208 of the act of 1917 contained the same provision.

The transaction involved herein having occurred *subsequent to March 3, 1917*, and the total ownership, interest, and control having remained in the same persons, it follows that the foregoing section applies to the transfer of the stock of the New Jersey company to plaintiff company. *W. A. Sheaffer Pen Co.* v. *Commissioner*, 9 B. T. A. 842, and the cases therein cited.

Section 326 (a) of the revenue act of 1918 provides as follows:

"That as used in this title the term 'invested capital' for any year means (except as provided in subdivisions (b) and (c) of this section):

"(1) Actual cash bona fide paid in for stock or shares;

"(2) Actual cash value of tangible property, other than cash, bona fide paid in for stock or shares, at the time of such payment, but in no case to exceed the par value of the original stock or shares specifically issued therefor, unless the actual cash value of such tangible property at the time paid in is shown to the satisfaction of the Commissioner to have been clearly and substantially in excess of such par value, in which case such excess shall be treated as paid-in surplus; * * *

"(3) Paid-in or earned surplus and undivided profits; not including surplus and undivided profits earned during the year;

"(4) Intangible property bona fide paid in for stock or shares prior to March 3, 1917, in an amount not exceeding (a) the actual cash value of such property at the time paid in, (b) the par value of the stock or shares issued therefor,

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or (c) in the aggregate 25 per centum of the par value of the total stock or shares of the corporation outstanding on March 3, 1917, whichever is lowest;

"(5) Intangible property bona fide paid in for stock or shares on or *after March 3, 1917*, in an amount not exceeding (a) the actual cash value of such property at the time paid in, (b) the par value of the stock or shares issued therefor, or (c) in the aggregate 25 per centum of the par value of the total stock or shares of the corporation outstanding at the beginning of the taxable year, whichever is lowest: *Provided*, That in no case shall the total amount included under paragraphs (4) and (5) exceed in the aggregate 25 per centum of the par value of the total stock or shares of the corporation outstanding at the beginning of the taxable year."

Inasmuch as the transactions involved in the *United Cigar Stores Co. case* occurred long prior to *March 3, 1917*, to wit, on *July 25, 1912*, the decision in that case is not applicable.

In computing plaintiff's tax liability the Commissioner of Internal Revenue followed the provisions of section 207 of the act of 1917, section 331 of the act of 1918, and section 326 (a) of the act of 1918; and the court is of the opinion that same was correctly computed.

The petition will be dismissed, and it is so ordered and adjudged.

SINNOTT, *Judge;* GREEN, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

ABRAHAM M. ELLIS v. THE UNITED STATES

[No. D-416. Decided March 11, 1929[1]]

On the Proofs

Sale of supplies; "as is"; "where is"; identification of article sold.—The condition of a sale of property that the same is sold "as is" and "where is," without warranty or guaranty as to quality, character, condition, size, weight, or kind, does not extend to the identity of the thing sold, and where articles are auctioned off by lot number and description, without being segregated in the lots so described, the successful bidder may rescind the sale.

[1] Motion for new trial overruled Mar. 3, 1930.

Same; catalogue of sale; unauthorized variation of terms.—Where a catalogue describing Government property to be sold by auction, made by its terms a condition of sale, provides that "no representative of the Government is authorized to make any statement or representation as to quality, character, condition, size, weight, or kind, of any property offered," an announcement by the officer in charge that articles in certain lots catalogued will be reassorted into classes and buyers given their percentage of each class, is unauthorized, and does not bind a successful bidder who bid on the property as described in the catalogue.

The Reporter's statement of the case:

Mr. Arthur A. Beaudry for the plaintiff. *Mr. Joseph W. Cox* and *Leckie, Cox & Sherier* were on the brief.

Mr. William W. Scott, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff is a citizen of the United States and is a manufacturer and dealer in hosiery and knit goods, residing and having his place of business in the city of Philadelphia, Pennsylvania.

II. Prior to and about November 23, 1922, the defendant caused to be advertised for sale by a catalogue prepared for that purpose in which different lots were designated by different lot numbers, and the items making up the different lots were also described and designated by different item numbers, at a public auction, to begin on the 23rd day of November, 1922, at 10 o'clock, at the Chicago General Intermediate Depot, Chicago, Illinois, certain lots of surplus property.

III. The terms and conditions of said auction sale, as stated in said catalogue advertising said sale, in part, are as follows:

"TERMS

"Twenty per cent of the bid must be paid in cash or certified check at the time and place of sale; balance within ten days from date of sale, in cash, certified check, or letter of credit, otherwise the Government reserves the right to forfeit the deposit as liquidated damages and the bidder shall lose all right or interest in the property. Where the

total accepted bid of any one purchaser at a sale amounts to $250 or less, the full amount must be paid at the time and place of sale. Letters of credit will not be accepted unless they are issued by banks which are members of the Federal reserve system. The letter of credit must be in a form approved by the central surplus property control officer against which an irrevocable draft may be drawn at once payable in 90 days from date of sale. Forms of acceptable letters of credit may be obtained at the office of the quartermaster supply officer, Chicago, Ill.

"INSPECTION

"All property listed for sale in this catalogue will be open for inspection for a period of one week prior to sale, during which time prospective buyers have an opportunity to examine such property, and failure on the part of any purchaser to inspect any property will not be considered as ground for any claim for adjustment or rescission.

"All property listed in this catalogue at said auction will be sold 'as is' and 'where is,' without warranty or guaranty as to quality, character, condition, size, weight, or kind, or that the said [*sic*] is in condition or fit to be used for the purpose for which it was originally intended, and no claim for any allowances upon any of the grounds aforesaid will be considered after the property is knocked down to a bidder by the auctioneer.

"In addition to the inspection of the lots of property at this place of storage samples may be seen in the auction room beginning on Thursday, Nov. 16th, 1922, and daily thereafter to date of sale between the hours of 9 a. m. and 3 p. m.

"GUARANTY AS TO SUBSISTENCE STORES

"All subsistence is guaranteed to be fit for human consumption at the date of sale.

"DELIVERY

"No delivery will be permitted until goods are paid for in full. Provided goods are paid for in full within ten days as required, the Government will permit the goods to remain in Government storage for thirty days from date of sale free of charge at the risk of the purchaser. After this thirty days the Government will charge storage at the local commercial rates or will place goods in commercial storage at the risk and expense of the purchaser, at the option of

the Government. The sale of each lot or part of each lot will be made as a whole and shipments will not be made of fractional parts thereof. In other words, the Government will not act as a distributor for the purchaser.

"The shipping officer is acting as agent for the purchaser and will not be responsible for demurrage, freight, or storage charges. Letter to this effect will be required before shipments are made. Same will be mailed from this office with letters of acceptance and should be signed and returned.

"'To CENTRAL SURPLUS PROPERTY CONTROL OFFICER,
"'*1819 W. Pershing Road, Chicago, Ill.*

"'You are hereby authorized to act as my agent in making shipment of goods bought by the undersigned at the sale of surplus property at Chicago on Nov. 23rd, 1922, and you are hereby relieved from any responsibility that may be incurred incident to the shipment or delivery thereof on account of freight, storage, or demurrage charges lawfully on file with the Interstate Commerce Commission.'

"GENERAL INFORMATION

"Prospective purchasers are required to procure a paddle number before the sale, as all bidders are recognized by number during the auction. Numbers may be obtained from the clerks in attendance upon payment of a deposit of $200 in order to entitle them to bid. This deposit of $200 will be returned if no purchases are made. No bidder will be allowed to have more than one paddle number. Should a bid be made by anyone who has not obtained a paddle number, such bid will be rejected. Purchaser of paddle will be held responsible for all purchases made under his assigned paddle number. Instances have been known where paddles have been loaned to outside parties. This is strictly prohibited and will not be tolerated under any circumstances.

"Strict adherence will be required in the matter of payments and prospective purchasers will save themselves and the Government's representatives annoyance by coming prepared to meet the terms as herein set forth. No exceptions will be made to the terms and conditions under which the property will be sold.

"It is the purpose of the Government to make this sale attractive to the small as well as to the large buyers. Therefore, in the case of large lots the Government may, in its option, offer for sale subdivisions [*sic*] which the property will be sold.

"The sale will begin at 10 a. m. Thursday, Nov. 23rd, 1922, and will continue daily beginning at 9.00 a. m. thereafter until all property has been sold.

"While samples of the property are believed to be representative, and will be exhibited at the time of the sale, prospective purchasers are urged to make an inspection of the property at its place of storage prior to the sale. This is especially enjoined owing to the fact that the Government will not entertain claims of any nature whatsoever should the property bought not come up to the standard of the sample or the expectation of the purchaser in any particular whatsoever. Purchasers are again informed that the property is sold 'as is' and 'where is,' f. o. b. cars or purchaser's trucks, place of storage.

"No representative of the Government is authorized to make any statement or representation as to quality, character, condition, size, weight, or kind of any property offered at this sale, and any representation or statement made by any representative of the Government concerning any such property will not be binding on the Government or considered as grounds for any claim or adjustment or rescission of any sale.

"Should the actual quantity of any article available for delivery prove to be less or greater than the quantity of such article as shown in this catalogue, such discrepancy will not invalidate the sale, nor be considered the basis of a claim. The purchaser will be required to pay on the basis of the purchase price for what he actually receives.

"The order in which the lots are presented in the catalogue does not necessarily indicate the order of sale. Changes may be necessary, and, if so, announcement to that effect will be made at the time of the auction.

"All material is sold f. o. b. cars or purchaser's trucks at place of storage. Shipments are made at the buyer's risk, the Government not to be responsible for any breakage or loss in loading and shipping.

"When a checker is not furnished by the purchaser in loading out cars or trucks, the Government's load and count must govern.

"CLAIMS

"No claims will be entertained except in shortage in delivery to the authorized representative of the purchaser.

"CHECKS

"Make all checks payable to the order of the 'Central Surplus Property Control Officer, Chicago, Ill.'

"GENERAL

"The Government reserves the right to reject any or all bids. It also reserves the right to sell the property in single lots as listed in this catalogue or in groups of two or more lots.

"All articles listed in this catalogue will be sold 'as is' and 'where is,' f. o. b. cars or trucks, place of storage, unless otherwise stated. Samples of same on display are believed to be representative, and descriptions accurate. However, inspection is urged prior to sale, as no claims will be entertained should the articles vary from the samples or not come up to expectations of the purchaser as to condition, quality, color, size, weight, width, construction, shape, or for any other reason. No claims or refunds will be entertained on account of any 'swells' or 'leaks' or damage to cans, packages, or containers resulting from 'leaks' or from any other cause."

IV. The sale started at ten o'clock a. m. on November 23, 1922. Before any of the lots described in the catalogue were put up for sale, Major McKeany, the officer in charge of the conduct of the sale, made an announcement "that there are a great many varieties of mills in the lots of stockings offered. This depot is going to segregate the lots as near as possible into the different mills and also the different repacks or rebales. Buyers are to be given their percentage of the amount so segregated."

V. The plaintiff did not arrive at the general intermediate depot at Chicago until a few minutes before eleven o'clock a. m. He was shown the lot of stockings which he believed was the one described in the catalogue as No. 368 and was advised that the different lots of hosiery were in different parts of the building, and, as the sale was already in progress, he made no further inspection, and proceeded to the auction room, where he deposited the sum of $7,000 in Liberty bonds and procured a paddle, which qualified him as a bidder on property offered for sale. No announcement was made during the time he was present at the sale changing in any manner the terms and description contained in the catalogue.

Reporter's Statement of the Case

When the plaintiff bid on the various lots he did not know that the stockings were not in the separate lots described in the catalogue.

VI. Among the lots of various kinds of property described in the said catalogue were the lots specifically described as follows:

Lot No.	Item No.	S. P. D. No.	Article	Quantity	Unit
52	133	C-20317	Stockings, wool, heavy, asst. sizes, unused	25,000	Pr.
173	792	C-20317	Stockings, wool, heavy, asst. sizes, unused	4,000	"
229	1352	C-20317	Stockings, wool, heavy, asst. sizes, unused	50,000	"
234	1357	C-20317	Stockings, wool, heavy, asst. sizes, unused	50,000	"
270	1555	C-20317	Stockings, wool, heavy, asst. sizes, unused	25,000	"
274	1559	C-20317	Stockings, wool, heavy, asst. sizes, unused	50,000	"
275	1560	C-20317	Stockings, wool, heavy, asst. sizes, unused	100,000	"
276	1561	C-20317	Stockings, wool, heavy, asst. sizes, unused	50,000	"
280	1565	C-20317	Stockings, wool, heavy, asst. sizes, unused	100,000	"
368	2561	C-21548	Stockings, wool, heavy, size 9½, unused	150	"
	2562	C-21548	Stockings, wool, heavy, size 10½, unused	81,006	"
	2563	C-21548	Stockings, wool, heavy, size 11½, unused	1,531	"
	2564	C-21548	Stockings, wool, heavy, size 11, unused	3,945½	"
185	969	C-21377	Cocoa, prepared, 15 oz	132	Cans.
191	979	C-21401	Preserves, raspberry #1	5,861	"
	980	C-21401	Preserves, strawberry #1	2,096	"
359	2521	C-21548	Leggins, canvas, foot navy style, size 4, unused	40	Pr.
	2522	C-21548	Leggins, fabrickoid, size 2, unused	115	"
	2523	C-21548	Leggins, fabrickoid, size 3, unused	660	"
	2524	C-21548	Leggins, canvas, foot size 2, unused	13,705	"
	2525	C-21548	Leggins, canvas, foot size 4, unused	18,222	"
	2526	C-21548	Leggins, canvas, navy style, size, unused	1	"
	2527	C-21548	Leggins, canvas, puttees, 5 size 4, 202 size 2, 8 size 3, unused.	215	"

(NOTE.—Under each lot of stockings was the following: "Note: Percentage of wool and cotton not guaranteed.")

The plaintiff made separate bids upon all the above-mentioned lots as offered, and they were separately knocked down to him as the highest bidder.

VII. At or near the conclusion of the last purchase the plaintiff was requested to make and did make an additional deposit of $5,000 in Liberty bonds on account of the purchases made by him, making a total deposit of $12,000.

VIII. The surplus property, including said stockings, advertised to be sold on November 23, 1922, was stored in the depot warehouse in Chicago, and all of said stockings in bales were stored together unsegregated on the same floor and in the same section in said warehouse, and were subject to inspection and were inspected by some of the prospective bidders during the period of one week immediately prior to said sale. Samples of said stockings were also on display

in the auction room and were furnished by runners to prospective bidders for inspection during the course of the sale.

IX. On Friday, November 24, 1923, while the said auction sale was still in progress, the plaintiff called on defendant's officer in charge thereof to make inquiries about the delivery of the purchases made by him and was advised that, owing to the fact that the sale had not been concluded, his matter could not then be given attention, and he was requested to return after the conclusion of the sale. On the next day, Saturday, November 25, Mr. Bodek, the representative of the plaintiff, called on the officer representing the defendant for the same purpose, and was informed that as the returns of the said sales were then being made up he could not give plaintiff's matter attention until said returns were completed, and it would be necessary for Mr. Ellis to make full and complete payment on all his purchases before any deliveries would or could be made of the whole or any part. He was advised to return on Monday, November 27, when delivery would probably be made.

X. The plaintiff left Chicago on November 26 for Philadelphia, leaving his agent, Mr. Bodek, in charge to receive the merchandise, and upon his arrival the next day obtained from the Tradesmen's National Bank, Philadelphia, Pennsylvania, four letters of credit dated November 27th, 1922, to the central surplus property control officer, as follows: No. 1743, $81,091.38; No. 1744, $576.88; No. 1745, $11.93; No. 1746, $7,401.81; all of which he mailed to his representative, Mr. Bodek, in Chicago, with which to make payment of the merchandise which had been purchased by him at said sale.

XI. On Monday, November 27, Mr. Bodek, acting as the agent of the plaintiff, again called on the defendant's officer and made inquiries about the delivery of the purchases made by the plaintiff, and was again informed by the surplus property officer in charge that final payment of all purchases would have to be made before any deliveries could or would be made, and was informed by Mr. Bodek that letters of credit were then in the mail and would arrive the next morning.

XII. On November 28, 1922, Mr. Bodek again called at the defendant's depot and advised the officer in charge that let-

ters of credit for full payment of said merchandise were in the mail addressed to him and made inquiries about the delivery of the goods. The officer in charge informed him that the lots of stockings had not been made up prior to the sale and that there were several million pairs of stockings in the depot, out of which one million pairs had been sold in the sale, and it would be necessary to take the million pairs of stockings therefrom and segregate them as near as possible into different mills, repacks, or rebales, giving to each buyer the proper percentage of different makes and grades.

XIII. Being unable to procure delivery of the lots of stockings, the plaintiff's agent, Mr. Bodek, then offered to pay for the lots of cocoa, preserves, and leggins (lots Nos. 185, 191, and 359), and demanded delivery of said lots which had been made up and separated prior to the sale and needed no segregation. But the officer in charge refused to deliver said leggins, cocoa, and preserves until all purchases made by the plaintiff at said sale were paid for in full.

XIV. On November 28, 1922, plaintiff addressed a letter, unsigned, to the central surplus property control officer, writing as follows:

"ATTENTION MAJOR M'KEANY

"DEAR SIR: On November 23rd and 24th, 1922, I purchased from you the following lots of merchandise:

Catalogue No. 52—25,000 prs. stockings at $0.15;
173—4,000 prs. stockings at $0.14⅞;
191—7,957 cans preserves at $0.07¼;
185—132 cans preserves at $0.07¼;
229—50,000 prs. of stockings at $0.15⅛;
234—50,000 prs. stockings at $0.15;
270—25,000 prs. stockings at $0.15;
274—50,000 prs. stockings at $0.15⅛;
275—100,000 prs. stockings at $0.15;
276—50,000 prs. stockings at $0.15;
280—100,000 prs. stockings at $0.15;
359—37,958 prs. leggins at $0.19½;
368—85,100 prs. stockings at $0.15⅛;

"And as a deposit on the said purchase, paid the sum of $12.000.00 in Liberty Bonds.

"On Saturday, November 25th, 1922, in accordance with the understanding had at the time of purchase that the goods

would be immediately delivered upon request and upon the payment of the balance due, I requested the delivery of the merchandise and was ready to tender the balance due but was advised by you that the merchandise would not be ready for delivery until November 27th or 28th, being Monday or Tuesday of the following week.

"On Monday, November 27th, 1922, I again requested the delivery of the merchandise and offered to tender the balance due but was advised by you that the merchandise would be assorted into lots and that it would take some time before you would be in a position to deliver the merchandise purchased. You further stated that you were unable to determine and that I would be unable to determine what composed the lots which were sold or what composed the lots purchased by me as such lots were not then in existence. This merchandise was sold by lots, which it now appears were not assorted or in existence at the time of the sale so that there was nothing in existence which could form the subject matter of the contract of sale.

"On Tuesday, November 28th, 1922, I again requested the delivery of the merchandise and tendered to you the balance due in letters of credit as follows:

"No. 1743—$81,091.38; Tradesmen's National Bank, Philadelphia, Pa. Cost of 539,100 prs. hose.

"No. 1744—$576.88; Tradesmen's National Bank, Philadelphia, Pa. Cost of 7,957 cans preserves.

"No. 1745—$11.93; Tradesmen's National Bank, Philadelphia, Pa. Cost of 132 cans cocoa.

"No. 1746—$7,401.81; Tradesmen's National Bank, Philadelphia, Pa. Cost of 37,958 prs. leggins.

"You thereupon refused to deliver the merchandise or accept the letters of credit for the balance due, as tendered, and stated that you were in no position at the present time to deliver the said merchandise to me; that whenever you were in a position to deliver what you decided or thought I meant to have purchased you would notify me of same.

"The merchandise was purchased by me for immediate delivery and resale, and, as the season for this merchandise is short, every day counts.

"In view of the above facts, I hereby advise you that I have this day rescinded the purchase of the entire lot of merchandise purchased on November 23rd and 24th, 1922, amounting to the sum of $89,082.00, and demand the return of the $12,000.00 in Liberty bonds deposited with you as earnest money.

"Trusting that I will receive the Liberty bonds without any delay and thanking you for the courtesies shown the writer, I am,

"Very truly yours,

"LAFAYETTE BLDG., *Philadelphia, Pa.*"

XV. On November 29th, 1922, and before the receipt of plaintiff's letter set out in Finding XIV, the officer in charge of the depot at Chicago addressed to plaintiff a letter of acceptance of bids and notice of award listing the purchases knocked down and sold to plaintiff but the plaintiff, having prior thereto learned that the stockings had not been segregated, refused to sign the same.

XVI. On Friday, December 1, 1922, the plaintiff received a telegram from the central surplus property officer reading as follows:

CHICAGO, ILL., *11.43 a. m., Dec. 1, 1922.*

A. M. ELLIS,

Lafayette Bldg., Philadelphia, Penn.:

Stockings will be ready. Your check 3.30 p. m., Saturday, December 2.

McKEANY.

XVII. The plaintiff left Philadelphia on Monday, December 4, 1922, arriving in Chicago on December 5, 1922, when he called at the central intermediate depot and informed Major McKeany he had letters of credit to pay for the lots knocked down to him at the sale and demanded delivery.

Major McKeany, representing the Government, at this time again informed the plaintiff that the lots of stockings had not been made up prior to the sale, but since the sale the stockings had been segregated according to the different grades, sizes, packings, and balings, and the plaintiff's purchases of all of the stockings at the sale being about 50 or 52%, he would receive that proportion of each kind and grade and each packing as assorted by the Government since the sale; that the stockings were then ready for delivery upon payment therefor and he advised the plaintiff he would not receive the return of his deposit, and he had better take what was offered to him and be satisfied. The plaintiff called to the attention of Major McKeany that, before the

sale, he had looked at the distinctive lot of stockings described in the catalogue as lot #368; upon investigation being made by Major McKeany as to this separate lot referred to by plaintiff, it was found, and Major McKeany admitted, that this lot had been distinct prior to the sale, but informed plaintiff that this lot would be apportioned in the same manner as other stockings, and part of this lot would be included in the proportionate distribution to plaintiff.

XVIII. At Major McKeany's request the plaintiff, in company with Captain Smith, a subordinate of Major McKeany, and a Mr. Haight, an agent of the plaintiff, went into the warehouse to examine the stockings as then assorted or divided by the Government, and it was found that about 55% of the said stockings were so-called "Chicago Baling," containing a mixed and numerous assortment of different brands and makes, the actual contents of such bales being unknown and the contents of each of said bales differing largely from the contents of other bales. The plaintiff was informed it was not the intention of the Government to open the said bales and sort the contents thereto and it was impossible to give each buyer his respective percentage of each kind and make in said bale; it was also ascertained by inspection that lot No. 368 was separated and, upon the contents being checked, the said lot contained about 9,000 pairs of stockings more than the quantity listed in the catalogue. The plaintiff asked for delivery of the contract quantity out of this lot, taking them as they came, but Major McKeany again advised that even as to this lot the Government would make the selection and give plaintiff what they thought to be a fair proportionate lot.

XIX. The plaintiff at that time offered to pay for and take the separate lots of cocoa, leggins, and preserves (lots Nos. 185, 191, and 359), which he had purchased at the sale, and he was informed that none of the lots would be delivered to him unless he paid the full amount of all the merchandise bid upon, and agreed to accept what the Government chose to give him of the different lots of the stockings described in the catalogue.

XX. The Government did not at any time separate or make up lots of stockings conforming to the different lots knocked down to plaintiff as described in the catalogue nor tendered nor offered nor prepared such lots for delivery, nor did the Government at any time set apart or apportion certain stockings as representing the specific lots claimed to have been purchased by the plaintiff.

XXI. On December 16, 1922, the supply officer at Chicago wrote the plaintiff as follows:

CHICAGO GENERAL INTERMEDIATE DEPOT,
OFFICE OF THE QUARTERMASTER SUPPLY OFFICER,
1819 WEST PERSHING ROAD, CHICAGO, ILLINOIS,
December 16, 1922.

Subject: Sale C–6439.
To: A. M. ELLIS,
Lafayette Building, Philadelphia, Pa.:

1. Reference is made to your purchase at the Chicago auction November 23 covered by letter of acceptance sale C–6439.

2. In this connection wish to advise that all the material purchased at this sale is ready to be shipped, and request that this office be furnished with a certified check in the amount of $88,107.84, together with shipping instructions, and immediately on receipt of same steps will be taken to expedite delivery.

(For the quartermaster supply officer.)
JOSEPH D. MCKEANY,
Mayor, Q. M. Corps.

XXII. On December 18, 1922, the Chicago General Intermediate Depot again wrote the plaintiff relative to his purchases as follows:

CHICAGO GENERAL INTERMEDIATE DEPOT,
OFFICE QUARTERMASTER SUPPLY OFFICER,
1819 WEST PERSHING ROAD, CHICAGO, ILLINOIS,
December 18, 1922.

McK: W: F
Div. 8–C
400.703 SP–ADM
Subject: Sales C–6439.
To: A. M. ELLIS,
Lafayette Bldg., Philadelphia, Pa.:

1. Attention is again invited to your purchase made at the Chicago auction Nov. 23rd in the amount of $88,107.84. deposit $12,000.00 Liberty bonds, our sales C–6439.

Reporter's Statement of the Case

2. Under date of Nov. 29 this office wrote you in reply to your letter of Nov. 28th in which you were advised that the Government does not consider that it has in any way violated the terms of the sale of the merchandise you purchased and that it expects you to carry out the terms of the contract. Under date of Dec. 16th this office wrote you requesting payment on this sale. To date no reply has been received to the letters addressed you.

3. The material which you purchased is now ready for immediate shipment, and it is requested that you furnish this office certified check or irrevocable letter of credit payable in ninety (90) days in the amount of $88,107.84, together with shipping instructions. Upon receipt of same, action will be taken to effect immediate shipment.

4. You are also advised that should you fail to make payment of the balance due prior to the expiration of the 30-day period, action will be taken by the local board of sales control, this depot, to retain your deposit, and the material will be resold and any loss sustained by the Government in the reselling of the material, together with the expenses of the sales, will be deducted from the deposit.

JOSEPH D. MCKEANY,
Major, Q. M. C.,
Central Surplus Property Control Officer.

XXIII. On December 28, 1922, the plaintiff sought an adjustment of the matter of his purchases at the sale on November 23, 1922, from the director of sales at the War Department in Washington. An opinion was rendered by the said officer that the sale of each lot was a separate and distinct sale and advised the plaintiff that the lots of cocoa, leggins, and preserves would be delivered to him upon payment therefor. Pursuant to this opinion of the director of sales, the plaintiff on December 29, 1922, forwarded letters of credit No. 1746, 1744, and a check in full payment of lots #185, 191, and 359, together with the instructions for delivery of such lots.

XXIV. On January 11, 1923, no delivery of the leggins, cocoa, and preserves having been made, the plaintiff gave notice to the Government that he elected to rescind and cancel the purchases of lots No. 185, 191, and 359, for the reason that his customers had canceled orders for this merchandise on account of delay in the delivery and plaintiff demanded return of the purchase price paid by him. The

Government drew against the plaintiff's letters of credit and used the check set in payment and received therefrom the sum of $7,991.23.

Thereafter the plaintiff had, at different times and under protest paid to the Government on its demand, the sum of $91.19 as storage charges on these lots of cocoa, preserves, and leggins.

XXV. On January 26, 1923, the defendant's officer at the Chicago depot wrote the plaintiff advising him that the office of the Quartermaster General had approved delivery to plaintiff of the leggins, cocoa, and preserves, bid at said auction sale by the plaintiff in the sum of $7,016.23, and requested the plaintiff to furnish shipping instructions therefor, and stated that upon receipt of such instructions said leggins, cocoa, and preserves would be forwarded, which letter the plaintiff replied to on February 23, 1923, when he again requested the Chicago depot to withdraw the draft on his letters of credit and check, and stated that he elected to rescind the purchase of said leggins, cocoa, and preserves owing to the unreasonable delay in making delivery.

XXVI. The plaintiff on March 1st, 1923, presented the matter of his purchases at said sale on November 23, 1922, to the Board of Contract Revision of the War Department at Washington, and requested the return of all money paid by him on account of such purchases.

Thereafter the plaintiff received notice from the Chicago depot that certain specific and numbered lots of stockings would be resold for plaintiff's account at public auction on May 17, 1923, and any deficiency, together with expenses of sale, would be charged to the plaintiff.

A marked catalogue of such sale was furnished to plaintiff, in which the stockings alleged to have been sold to plaintiff at the auction of November 23, 1922, and which were marked for resale, were listed and described as separate and distinct lots, some being the same distinct lot numbers as those knocked down to plaintiff, while others were described by lot numbers differing from the lot numbers contained in the catalogue of November 23, 1922; the item numbers describing the said stockings all differed from the

item numbers in the catalogue of November 23, 1922; and only three item numbers are used to describe all the different lots, instead of separate and distinct item numbers for each lot as used in the catalogue of November 23, 1922.

Lot No. 368 in the catalogue of November 23, 1922, was numbered lot No. 251 in the marked catalogue, but was described as containing three different items of stockings, and with the same accuracy as to count and contents as in the catalogue of November 23, 1922, except that instead of giving each item in said lot a different item number, as in the catalogue of November 23, 1922, one item number is used to describe the three different items.

These lots were not even then separate or distinct, and stockings other than those claimed to be advertised for resale were included in the sale, and separate lots containing the quantities and numbered or identified by the lot and item numbers used in the catalogues of November 23, 1922, or May 17, 1923, were never made up either before or after the sale of November 23, 1922, or the sale of May 17, 1923.

XXVII. Thereafter the question of plaintiff's purchases was submitted to the Judge Advocate General of the Army, who ruled, in effect, that the manner of the original sale of the stockings would not justify a rescission by the plaintiff, and that the manner of the resale of said stockings would not prejudice plaintiff's rights, but that plaintiff would have the right to rescind the purchase of the leggins, cocoa, and preserves on account of the defendant's delay in the delivery thereof.

XXVIII. In apparent compliance with the opinion of the Judge Advocate General, the Chicago depot thereafter transmitted a voucher to the plaintiff with an accounting attached, showing the amount of $6,746.11 to be due to the plaintiff as the balance of his deposit and payments, after deducting various charges made against him, and requested the plaintiff to sign the voucher with the statement attached, to the end that the refund of the amount represented by the voucher might be made. The following is a copy of the said account:

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NOVEMBER 16, 1923.

Statement of account of A. M. Ellis

	Debit	Credit
Stockings sold to Mr. Ellis November 23/22	$81,091.61	
Lots 185, 191, 359 (cocoa, leggins, & preserves) sold Mr. Ellis	7,016.23	
Par value of Liberty bonds & Treasury note deposited 11/23/22		$12,000.00
Credit value of 3 lots goods canceled (J. A. G.) opinion		7,016.23
Draft paid on L/C No. 1744, Mar. 3, 1923		576.88
Draft paid on L/C No. 1746, Mar. 3, 1923		7,401.81
Check recd. from Mr. Ellis, deposited Jan. 26, 1923		12.54
Auctioneer fee for reselling stockings, May 17, 1923	556.82	
Storage charges on stockings only, 12/23/22-5/17/23 (4 mo. 24 days), 1,540 sq. ft. at $0.075 sq. ft	554.40	
Interest on $80,116.61 at 6% from 12/2/22-5/17/23	2,203.21	
Storage charges paid by Mr. Ellis on 3 lots up to June 30, 1923		57.63
Storage charges paid by Mr. Ellis on 3 lots from 7/1/23-9/30/23		33.56
Excess realized on sale of security, November 15, 1923		585.94
Amount realized on resale of stockings May 17/23		70,483.79
	91,422.27	98,168.38
Credit to Mr. Ellis to balance account	6,746.11	
	98,168.38	98,168.38
Sales price of stockings	81,091.61	
" " " 3 lots	7,016.23	
	88,107.84	
Paid in cash & L/Cs	7,991.23	
	80,116.61	

Amt. recd. sale of Liberty bonds & Treasury note 11/15/23, $12,585.94.

The plaintiff signed and returned this voucher with a letter in which he stated that he would accept the proposed refund with the reservation that such acceptance was without prejudice to his right to sue for the balance which he claimed to be due.

XXIX. The entire matter of plaintiff's purchases at said sale was referred by the Finance Office of the War Department to the Comptroller General. Thereafter the plaintiff received the following letter:

WAR DEPARTMENT,
OFFICE OF THE DIRECTOR OF SALES,
Washington, May 12, 1924.

MR. A. M. ELLIS,
314 Lafayette Building, Philadelphia, Pa.

DEAR SIR: With reference to your claim arising out of the sale to you of stockings, cocoa, leggins, and preserves, made at Chicago, Ill., November 23, 1922, you are advised that the Comptroller General has rendered a decision dated March 26, 1924, in which he holds that the payment of the

voucher for $6,746.11 is unauthorized. Therefore the finance officer declines to make payment of same.

If the items of leggins and preserves have not been resold and you desire to accept delivery of same, kindly notify the depot quartermaster at Chicago, Ill., and they will be delivered to you upon payment of storage charges; otherwise, these items will be resold to your account at the next Chicago sale.

Yours very truly,

(Signed) C. D. HARTMAN,
Director of Sales.

XXX. The Government had received and holds the sum of $12,585.94, the price received from the sale of November 15, 1923, of the Liberty bonds deposited at the time of the first sale; the further sum of $7,991.23 received from the drafts drawn on the letters of credit and check cashed on December 29, 1922, for the lots of cocoa, preserves, and leggins; and the further sum of $91.19 paid under protest as storage charges on the lots of cocoa, preserves, and leggins.

The court decided that plaintiff was entitled to recover.

MOSS, *Judge*, delivered the opinion of the court:

In this case the Government advertised for sale thirteen different lots of merchandise. The property was described in printed advertisements as separate lots of merchandise. Each lot was identified by a lot number, and the contents of each lot were described by an item number, and the quantities of the different lots were specifically stated. Plaintiff's bids on the thirteen lots were accepted, and he deposited $12,000 in Liberty bonds. One lot consisted of cocoa, another of preserves, and still another of leggins; the remaining ten lots were of stockings. After the sale plaintiff ascertained that only four of the thirteen lots of merchandise had been separated or made up into lots, and these four consisted of the cocoa, the preserves, the leggins, and one lot of the stockings, number 368. The remaining nine lots of stockings were included in one large mass of stockings consisting of three millions of pairs located in a warehouse. Plaintiff demanded delivery of the segregated lots, the cocoa, the preserves, the leggins, and the lot of

stockings, number 368. The Government, however, declined to deliver any part of said merchandise unless plaintiff would pay the entire purchase price of the thirteen lots. In addition to the deposit of Liberty bonds, for which the Government has received $12,585.94, the Government has retained the sum of $7,991.23, which plaintiff paid for the cocoa, preserves, and leggins, and the further sum of $91.19 demanded by the Government as storage charges on said three lots, making a total of $20,668.36 paid by plaintiff to the Government. This suit is for the recovery of said amount.

The sale occurred on November 23 and 24, 1922. The merchandise was purchased for immediate delivery and resale. On November 25, 1922, plaintiff, by letter, requested the delivery of the merchandise, and was advised that the delivery would be ready on November 27 or 28. On November 27 plaintiff again requested the delivery of the goods, and was informed that the merchandise would be assorted into lots which would take some time. On November 28 plaintiff renewed his request for the delivery of the merchandise and tendered to the Government letters of credit in the aggregate sum of $89,082 in payment of the balance due. Plaintiff was then informed that the Government was not in a position to deliver the merchandise, and that plaintiff would be notified when said goods were ready for delivery, whereupon plaintiff formally rescinded the purchase of the entire lot of merchandise, and demanded the return of the amount paid in as aforesaid.

Unavailing efforts were thereafter made to effect an adjustment of the differences between plaintiff and the Government growing out of the transaction. Plaintiff was advised by an officer of the Government that plaintiff's purchases of stockings amounted to 50 per cent, or 52 per cent of the total sales of stockings, and that he would receive that proportion of each kind and grade as assorted by the Government after the sale, and that this method would also be applied to the stockings contained in lot number 368, which had been made up before the sale, and had been inspected by plaintiff prior to the sale. (Finding XVII.) Thereupon an immediate investigation was made by plaintiff, in company

with representatives of the Government, which disclosed the fact that the stockings in the warehouse were contained in bales consisting of different brands and makes, but the actual contents of which were unknown, and the contents of each bale differed largely from the contents of other bales. Plaintiff was then informed that it was not the intention of the Government to open said bales and assort their contents. (Finding XVIII.) The Government did not at any time separate, or make up, or tender to plaintiff, lots of stockings conforming to the lots as described in the catalog and as purchased by plaintiff. (Finding XX.)

The terms of the sale contained the notice that the property listed in the catalog would be open for inspection for a period of one week prior to the sale, during which time prospective buyers would have an opportunity to examine such property, and that failure to inspect same would not be considered as ground for adjustment or rescission. It was further stated in the terms of sale that "Samples of same on display are believed to be representative and descriptions accurate. However, inspection is urged prior to sale, as no claims will be entertained should the articles vary from the samples or not come up to the expectations of the purchaser as to condition, quality, shape, or for any other reason." It is defendant's contention that with these warnings plaintiff can not now complain that said stockings were not segregated, nor made up into lots as described in the catalog. The lot of stockings described in the catalog as number 368 was shown to plaintiff, and being satisfied with his inspection of same, and being advised also that the lots of stockings were in different parts of the building, he made no further inspection. We are of the opinion that plaintiff was justified in assuming that the remainder of the stockings were likewise made up in lots in accordance with the terms of the advertisement, and as specifically set forth in the catalog. His bids were based on specified lots of merchandise particularly described in the terms of the sale. The identity of the merchandise sold could be established only by specified lot and lot number. Plaintiff did not bid for nor purchase unascertained merchandise to be selected by the Government from a large mass containing three million

Opinion of the Court

pairs of stockings. He agreed to purchase the definite lots stated in the catalog, and defendant accepted plaintiff's bids in the terms of the catalog, and attached to its letter of acceptance and award an itemized list of the property purchased by *lot number and description*. Plaintiff bid for certain merchandise itemized as above set forth, and by accepting plaintiff's bid defendant agreed to deliver such merchandise so identified and described.

The question in this case differs essentially from the principle involved in cases of sales of property sold " as is," and " where is," without warranty or guaranty as to quality, character, conditions, etc., etc. The question here goes to the identification of the thing sold and is not a mere matter of warranty. This distinction is pointed out in the case of *United States* v. *Koplin*, 24 Fed. (2d) 840.

It is claimed by the defendant that an announcement was made at the beginning of the sale to the effect that the lots described in the catalog were not identified, or separate, and that the Government would segregate the lots as nearly as possible into the different grades or makes, and that buyers would be given their percentage of the amount so segregated. It was testified by certain witnesses who were bidders, and were present at the beginning of the sale, that they heard no such announcement. However that may be, it is shown by uncontradicted evidence that plaintiff was late in his attendance at the sale, and no such announcement was made after his arrival, nor did he receive any information concerning same. The catalog contained the following provision: " No representative of the Government is authorized to make any statement or representation as to quality, character, *condition*, size, weight or kind, of any property offered at this sale * * *." (Our italics.) It was said in the *Koplin case*, *supra*, " The catalog, which was the authority for the auction, expressly stated that there was no power in those conducting it to make representations or sales by sample."

The Government not only failed to comply with the terms of the sale as to the nine lots of stockings which were never segregated, but declared its purpose of reassorting lot number 368, which had been made up before the sale.

This was the first Government sale of stockings where one large lot was described as several distinct lots, and the reason for the adoption of this unusual method of advertisement and sale was stated to be that a better price would be obtained by such method.

The Government thereafter sold all of the property involved in this controversy, and claims to have sustained a loss which exceeds the amount paid by plaintiff, and retained by defendant, in the sum of $945.08.

We have reached the conclusion under the facts in this case that plaintiff had the right to rescind the contract and is entitled to recover the amount paid by plaintiff as hereinabove set forth, to wit: $20,668.36.

SINNOTT, *Judge;* GREEN, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

RUSSIAN VOLUNTEER FLEET v. THE UNITED STATES[1]

[No. A-69. Decided April 1, 1929[2]]

On Motion to Dismiss Petition

Jurisdiction; right of alien to sue United States; sec. 155, Judicial Code; citizen of Russia.—The governments referred to in section 155 of the Judicial Code, the citizens of which may sue the United States, are only such as have been recognized by the proper authorities of the United States; i. e., by the executive and not the judicial branch of the Government.

The Reporter's statement of the case:

Mr. P. M. Cox, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the motion to dismiss.

Messrs. Horace S. Whitman and *Charles Recht*, opposed. *Mr. H. Rozier Dulany, jr.*, was on the brief.

The material allegation of the petition is stated in the opinion.

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[1] Certiorari granted.
[2] Motion for new trial overruled Nov. 4, 1929.

Opinion of the Court

SINNOTT, *Judge*, delivered the opinion of the court:

This matter comes before the court on defendant's motion to quash plaintiff's notice of September 19, 1928, to take the testimony of certain witnesses in Washington, D. C., and also to dismiss the petition.

It is stated in plaintiff's brief:

"The plaintiff in this case is a corporation and citizen of the Union of Soviet Socialist Republics. The plaintiff has alleged and now offers to prove that a citizen of the United States is or was accorded the right to prosecute claims against the said Russian Soviet Government in its courts or against the Kerensky government in the courts of that government."

It is contended by defendant that this court is without jurisdiction, upon the ground that it is asked to admit evidence and upon that evidence judicially to determine a political question involving the recognition of the existence of the Union of Soviet Socialist Republics in Russia, and also the recognition of the existence of a judiciary therein, which questions the defendant contends only the executive branch of our Government is empowered to determine.

The right of aliens to sue in this court is provided for in the Judicial Code, as follows:

"SEC. 155. Aliens who are citizens or subjects of any government which accords to citizens of the United States the right to prosecute claims against such government in its courts shall have the privilege of prosecuting claims against the United States in the Court of Claims, whereof such court, by reason of their subject matter and character, might take jurisdiction."

Whether there exists a government in Russia, known as the Union of Soviet Socialist Republics, is a question preliminary to the determination of the right of citizens of the United States to prosecute claims against such government in its courts.

It has been repeatedly held that, under our polity of government, the existence or nonexistence of governments is a matter for the determination by the executive and not the judicial department of this Government. This doctrine is

well stated by the Supreme Court in *Kennett* v. *Chambers*, 14 How. 38:

"It is a sufficient answer to the argument to say that the question whether Texas had or had not at that time become an independent State was a question for that department of our Government exclusively which is charged with our foreign relations. And until the period when that department recognized it as an independent State, the judicial tribunals of the country were bound to consider the old order of things as having continued, and to regard Texas as a part of the Mexican territory. And if we undertook to inquire whether she had not in fact become an independent sovereign State before she was recognized as such by the treaty-making power, we should take upon ourselves the exercise of political authority, for which a judicial tribunal is wholly unfit, and which the Constitution has conferred exclusively upon another department.

"This is not a new question. It came before the court in the case of *Rose* v. *Himely*, 4 Cr. 272, and again in *Gelston* v. *Hoyt*, 3 Wheat. 324. And in both of these cases the court said that it belongs exclusively to governments to recognize new States in the revolutions which may occur in the world; and until such recognition, either by our own Government or the government to which the new State belonged, courts of justice are bound to consider the ancient state of things as remaining unaltered."

See also *United States* v. *Palmer*, 3 Wheat. 610; *The Nueva Anna*, 6 Wheat. 193; *Jones* v. *United States*, 137 U. S. 202; *The Penza, The Tobolsk*, 277 Fed. 91; *Russian Socialist Federated Soviet Government* v. *Cibrario et al.*, 191 N. Y. S. 543; *Lehigh Valley R. Co.* v. *State of Russia*, 21 Fed. (2d) 396; *Sokoloff* v. *National City Bank*, 199 N. Y. S. 355.

We take the following pertinent excerpts from the above cases:

"All courts of justice are bound to take judicial notice of the territorial extent of the jurisdiction exercised by the government whose laws they administer, or of its recognition or denial of the sovereignty of a foreign power, as appearing from the public acts of the legislature and executive, although those acts are not formally put in evidence, nor in accord with the pleadings." *Jones* v. *United States*, *supra*, p. 214.

"The courts must follow and may not lead the executive. They have no authority to institute an original inquiry into

conditions of a foreign state of government. Which is a sovereign, *de jure* or *de facto*, of a territory is not a judicial but a political question for determination. But the legislative and executive department of any government by its decision or action binds the judicial." *The Penza, The Tobolsk, supra*, p. 92.

"It is equally a settled rule of law that the foreign relations of our Government are committed by the Constitution to the executive and legislative departments of our Government, and what is done by such departments is not subject to judicial inquiry or decision. * * * It is for the executive and legislative departments to say in what relations any other country stands toward it. Courts of justice can not make the decision." *Lehigh Valley R. Co.* v. *State of Russia, supra*, p. 399.

"It is also settled law that allegations in a pleading tending to show that a government is sovereign in character are not conclusive on demurrer, but that the court is bound to take judicial notice of the fact as it exists in reality. To enable it to correctly determine the fact, the courts may have recourse to such sources of information as they deem most trustworthy." *Russian Socialist Federated Soviet Republic* v. *Cibrario*, 198 App. Div. 869, 191 N. Y. Supp. 543.

"The Soviet Government of Russia has never been recognized by our Government; hence we may not ascribe any of the attributes of sovereignty to it. It follows that all the acts of that Government in contemplation of American courts are ineffective, without consent of the parties concerned, to create, transfer, or nullify legal obligations. So far as the defendant seeks to deduce such legal consequences from the decrees and activities of the Soviet Government, its defense is insufficient." *Sokoloff* v. *National City Bank, supra*, p. 358.

"Not only are the courts bound to take judicial notice of public matters, as before stated, which bear upon the question of our recognition of foreign sovereignties, but they have the right, where they are in doubt as to the facts, to call upon the Department of State for the necessary information." *Russian Socialist Federated Soviet Government* v. *Cibrario et al., supra*, p. 547.

This court must take judicial notice of the fact that recognition has been denied by the Executive and the State Department to the Union of Soviet Socialist Republics in Russia. The right given an alien to sue the United States in section 155 of the Judicial Code, *supra*, is a great privilege—one arising out of comity between nations. We must

conclude that Congress, when it granted this great privilege to the subjects "of any government" according reciprocal rights to citizens of the United States, had in mind such governments as may be recognized by the proper authorities of the United States under our well-known polity of government.

Until the Union of Soviet Socialist Republics is so recognized this court has no jurisdiction over the case at bar, except to dismiss it. It is therefore ordered and adjudged that plaintiff's petition be, and the same is hereby, dismissed.

GREEN, *Judge;* MOSS, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

AMERICAN EXCHANGE UNDERWRITERS, ELIJAH R. KENNEDY, AND JOSEPH S. IRVING, A COPARTNERSHIP DOING BUSINESS AS WEED & KENNEDY, ATTORNEYS IN FACT AND TRUSTEES, v. THE UNITED STATES

[No. F-77. Decided April 1, 1929.[1]]

On the Proofs

Insurance tax; reciprocal or interinsurance exchange; conduct of business through attorney in fact and trustees.—See *Hardware Underwriters et al.* v. *United States*, 65 C. Cls. 267.

Same; exempted classes; sec. 231 (10), revenue act of 1918; sec. 1013 (b), revenue act of 1924; burden of proof.—

(1) Where a reciprocal or interinsurance exchange is not one whose income "consists solely of assessments, dues, and fees collected from members for the sole purpose of meeting expenses" (sec 231 (10), revenue act of 1918), it is not "otherwise exempt" within the meaning of section 1013 (b) of the revenue act of 1924, and it is therefore not exempt under section 231 (10), which applies as though section 1013 (b) had not been enacted.

(2) Under the circumstances the burden is upon the plaintiff to show that it is within the exemption.

[1] Motion for new trial overruled Mar. 3, 1930.

The Reporter's statement of the case:

Mr. Daniel V. Howell for the plaintiff. *Messrs. Joseph S. Brooks* and *Charles M. Howell* were on the briefs.

Mr. C. R. Pollard, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. Alexander H. McCormick* was on the brief.

The court made special findings of fact, as follows:

I. Elijah R. Kennedy and Joseph S. Irving were, at the time of the filing of this action, partners doing business under the firm name and style of Weed & Kennedy, with their principal place of business in New York City, in the State of New York.

II. The firm of Weed & Kennedy, copartners, began in 1872. The partnership at that time was composed of Samuel R. Weed, Elijah R. Kennedy, and Edward T. Mostert. Samuel R. Weed died in 1918, and the copartnership continued under the firm name and style of Weed & Kennedy, with Kennedy and Mostert as partners. Mostert retired at the end of 1919 and Joseph S. Irving was admitted into the partnership. Said partnership continued under the name of Weed & Kennedy. About July, 1926, after the filing of this suit, Elijah R. Kennedy died and since that time Joseph S. Irving has continued to transact the business of said firm under the firm name and style of Weed & Kennedy.

III. In 1905 Weed & Kennedy acquired an agreement and power of attorney originally entered into in 1892 by subscribers known as the Lloyds of New York City and now known as the American Exchange Underwriters, such change of name being in accordance with permission received from and on file in the insurance department of the State of New York.

The American Exchange Underwriters is the title of a department in the office of Weed & Kennedy, where Weed & Kennedy as attorneys in fact exchanged, during the period involved, contracts of indemnity for various concerns throughout the country, known as subscribers on the reciprocal or interinsurance plan, securing necessary reinsurance from companies in and outside the State of New York.

During the period involved in this action about three hundred and eighty merchants and others owning sprinkler establishments, desiring to indemnify each other from loss by fire and tornado, on their business property, executed to Weed & Kennedy a separate and individual power of attorney. The form of the power of attorney is attached to the first amended petition, marked "Exhibit A," and is made a part hereof by reference.

The method of doing business, during the period involved, was as follows:

Acting under such power of attorney, the attorneys in fact, Weed & Kennedy, effected the exchange of contracts of indemnity by issuing to said subscribers individual contracts for and on behalf of each of the other several subscribers who had so empowered said attorneys in fact to act for them, by which contract each of said subscribers, singly and individually, and not jointly, agreed to insure the specific property of such recipient of such contract against loss by fire or tornado. Such contracts were issued at various dates and were for terms of one or five years and in specific amounts. The attorneys in fact, in executing the contract, subscribed said contract in the name of each subscriber at said exchange, so exchanging indemnity with the subscriber insured. A copy of the contract used is filed with the amended petition, attached thereto, marked "Exhibit B," and is made a part hereof by reference.

Weed & Kennedy received for "all expenditures of management, except disbursements for losses, adjustments, fees, fire patrol, taxes, and expenses incurred or ordered by the trustees, 17½% of the deposits put up by each subscriber."

Each subscriber signed a power of attorney separate from each of the other subscribers. There was no joint power of attorney. There were no articles of association existing among the subscribers, nor was there any charter or by-laws. The power of attorney and the contract were the only documents under which the indemnity was exchanged between the various subscribers.

At the time of the execution of such contracts of indemnity each subscriber deposited with the attorneys in fact such

amount as the attorneys in fact thought necessary to secure the performance by said subscriber of his contract with each of the other subscribers.

The deposits so put up by each subscriber were received by Weed & Kennedy as attorneys in fact, who deposited the same in the bank to an account called the "manager's account" or "attorney-in-fact account." Out of these monies so deposited Weed & Kennedy paid themselves once a month. The balance of the monies so deposited was turned over to the trustees. The trustees deposited the amount so turned over to them in a bank account in the name of "American Exchange Underwriters, trustees' account."

The money in the said "trustees' account" was sometimes withdrawn and invested by the trustees in interest-bearing securities, to wit, bonds approved by the insurance department of the State of New York. The interest so derived was credited to the subscribers in the same proportion as their deposits, and was applied with the deposits toward the payment of losses. The amount of interest so earned and deposited is not disclosed by the record.

Each subscriber had a separate ledger account which showed the amount of his deposits and the deductions therefrom, on account of losses and expenses, and the additions thereto resulting from interest earned.

Losses chargeable against the deposit of the subscriber were determined in accordance with the ratio of the subscriber's annual deposits to the sum of the annual deposits of all the other subscribers. If at the end of the year, after deducting the amounts paid out for expenses and losses, there remained a balance to the account of the subscriber, the same was accumulated to the account of such subscriber until the amount accumulated amounted to five times the annual deposit. The amount so accumulated was held by the trustees. After the subscriber had accumulated in said account five times his annual deposit the annual savings were paid to him in cash. If the subscriber withdrew at any time either before or after accumulating a surplus in said account all monies remaining to his credit on the individual ledger account were returned to him.

The trustees were provided for in the power of attorney and the manner of selecting them was in conformity with the requirements of the power of attorney.

Contracts were frequently canceled by the attorneys in fact or by the trustees.

Weed & Kennedy controlled the American Exchange Underwriters' account at the bank. The trustees had no control whatever over said account. When a portion of the money was withdrawn from the account of the American Exchange Underwriters, manager's account, it was placed in the American Exchange Underwriters, trustees' account, of which account the trustees had control. It was necessary for two trustees to sign checks against that account.

There were, during the period in question, many changes in the list of subscribers. It frequently happened that a subscriber would drop out at the expiration of his contract. Sometimes Weed & Kennedy would cancel a contract because it was not a desirable risk.

IV. Claiming to act under the provisions of sections 1000 (a) and 1000 (c), revenue act of 1918, the collector of internal revenue for the second district of the State of New York required American Exchange Underwriters and Weed & Kennedy, attorneys in fact, to make a return on forms furnished by the collector, as a mutual insurance company, as and for a capital-stock tax for the period July 1, 1921, to June 30, 1922, for the purpose of assessing a capital-stock tax under said section. Weed & Kennedy protested the making of said return, but made it, and paid said tax, amounting to $830.00, on April 10, 1922. Said tax was paid by a check drawn upon a New York bank by Weed & Kennedy, as attorneys in fact, upon the "manager's account." The signature to the check was "American Exchange Underwriters, Weed & Kennedy, manager."

Plaintiff filed a claim for refund November 10, 1925, which was rejected by the Commissioner of Internal Revenue December 31, 1925.

The court decided that plaintiff was not entitled to recover.

Opinion of the Court

GRAHAM, *Judge*, delivered the opinion of the court:

This case was argued orally and with briefs, and submitted at the same time as the *Hardware Underwriters case*, C-1277 [65 C. Cls. 267], the joint argument and submission being with the understanding that the two cases involved practically the same questions of law. The findings of fact and opinion of the court in the *Hardware Underwriters case* were handed down on April 2, 1928, and the instant case was on April 16, 1928, remanded to the docket "to await the final decision in the case of *Hardware Underwriters and National Hardware Service Corporation*, No. C-1277, decided by this court April 2, 1928." A motion for a new trial and amended findings of fact was denied in said *Hardware Underwriters case* on May 28, 1928, and on August 17, 1928, a petition for a writ of certiorari was filed in the Supreme Court. The writ was denied on November 26, 1928.

In that case it was held that the plaintiffs cooperated to carry on a business of insurance, and that, regardless of what may have been the arrangements among themselves, and themselves and the attorney in fact, or the method of keeping the books, they constituted an association within the meaning of section 505 of the revenue act of 1917, 40 Stat. 316, and section 504 of the revenue act of 1918, 40 Stat. 1104, and were an "association," within the meaning of the said revenue acts of 1917 and 1918, issuing policies of fire insurance upon which a tax was imposed by section 504 (b) of the revenue act of 1917 and section 503 (b) of the revenue act of 1918; that the sums which the subscribers deposited in order to secure the issuance or renewal of policies of insurance were "premiums" within the meaning of that term as used in the sections last cited, and further, that the plaintiffs were not exempt from taxation under section 504 (d) of the revenue act of 1917, section 503 (d) of the revenue act of 1918, and section 1013 (b) of the revenue act of 1924, 43 Stat. 343. All three of these grounds, it is to be assumed, were well taken judged by the action of the Supreme Court in refusing to grant a certiorari.

The same conclusion as to its being an association and the sums deposited by subscribers being premiums was sus-

tained in the case of *Pickering* v. *Alyea-Nichols Co.*, 21 Fed. (2d) 501, in which case a certiorari was denied by the Supreme Court, which was a case arising, like the *Hardware Underwriters case*, under the insurance law of the State of Illinois.

There is a difference in facts without a distinction in principles between the instant case and the *Hardware Underwriters case*. The instant case arose under the insurance law of the State of New York and involves a tax under section 1000 (a) and (c)[1] of the revenue act of 1918, 40 Stat. 1126.

A like case, and involving the same statutes, is *Jewelers' Safety Fund Society* v. *Edwards*, 24 Fed. (2d) 385, which also was a New York insurance company. In that case the plaintiff was an interinsurance and reciprocal association, as is the plaintiff here. That case held, as was held by this court in *Hardware Underwriters case* and by the circuit court of appeals in the *Pickering case*, *supra*, that the plaintiff was an "association" within the meaning of the act, and that the deposits made to secure insurance or renewal of it were premiums. So that on these two questions there is a unanimity of authority as far as the instant case is concerned, and the only question left is whether the plaintiff here was exempt from taxation under section 504 (d) of the revenue act of 1917, section 503 (d) of the revenue act of 1918, and section 1013 (b) of the revenue act of 1924.

The facts in this case as far as the question of exemption is concerned are practically the same as in the *Hardware Underwriters case;* that is to say, that the sums which the

[1] SEC. 1000. (a) That on and after July 1, 1918, in lieu of the tax imposed by the first subdivision of section 407 of the revenue act of 1916—

(1) Every domestic corporation shall pay annually a special excise tax with respect to carrying on or doing business, equivalent to $1 for each $1,000 of so much of the fair average value of its capital stock for the preceding year ending June 30 as is in excess of $5,000. In estimating the value of capital stock the surplus and undivided profits shall be included; * * *

* * * * *

(c) * * * The taxes imposed by this section shall apply to mutual insurance companies, and in the case of every such domestic company the tax shall be equivalent to $1 for each $1,000 of the excess over $5,000 of the sum of its surplus or contingent reserves maintained for the general use of the business and any reserves the net additions to which are included in net income under the provisions of Title II, as of the close of the preceding accounting period used by such company for purposes of making its income-tax returns. * * *

subscribers were required to deposit in order to secure insurance or a renewal of their contracts were arbitrarily fixed by the attorney in fact, and that these deposits were not limited to amounts needed "for the sole purpose of meeting expenses." This appears not only from the terms of the subscription agreement but from the fact that the plan of the association embraced the building up of a surplus and reserve, and, further, that a part of plaintiff's income was derived from interest on investments and reserve deposits.

Plaintiff was taxed under section 1000 (a) and (c) of the revenue act of 1918, 40 Stat. 1126, as a company "carrying on or doing business," as we have held, for all practical purposes, as a mutual insurance company.

The question remaining is whether plaintiff was exempt from taxation under section 231 (10)[2] of the revenue act of 1918, 40 Stat. 1076, and section 1013 (b)[3] of the revenue act of 1924, 43 Stat. 343.

It will be seen from section 231 (10) of the act of 1918 that the farmers' and mutual hail, etc., companies thereby exempt, were those only whose income "consists solely of assessments, dues, and fees collected from members for the sole purpose of meeting expenses." Plaintiff does not come within this limitation, as a portion of its income was interest on invested capital, surplus and reserve, and also as the amounts collected as premiums and dues were not for "the sole purpose of meeting expenses," but for reserve and surplus. It thus appears that the plaintiff is not exempt under section 231 (10), and as section 1013 (b) applies to companies "if otherwise exempt under such paragraphs," i. e.,

[2] SEC. 231. That the following organizations shall be exempt from taxation under this title * * *:

(10) Farmers' or other mutual hail, cyclone, or fire insurance companies, mutual ditch or irrigation companies, mutual or cooperative telephone companies, or like organizations of a purely local character, the income of which consists solely of assessments, dues, and fees collected from members for the sole purpose of meeting expenses.

[3] SEC. 1013. (b) The exemption provided in paragraph (10) of subdivision (a) of section 11 of the revenue act of 1916, and in subdivision (10) of section 231 of the revenue act of 1918, and in subdivision (10) of section 231 of the revenue act of 1921, shall be granted to farmers' or other mutual hail, cyclone, or fire insurance companies (if otherwise exempt under such paragraphs), whether or not such organizations were of a purely local character. Any taxes assessed against such organizations shall, subject to the statutory period of limitations properly applicable thereto, be abated, credited, or refunded.

section 231, and plaintiff not being exempt, it clearly does not apply to the plaintiff.

The said section 1000 (a) and (c) imposes a tax on "every domestic corporation * * * carrying on or doing business," and this tax is applied by the act to "mutual insurance companies."

From these domestic corporations, including mutual insurance companies so taxed, section 231 (10) exempts certain domestic corporations, among others, "farmers' or other mutual hail, cyclone, or fire insurance companies." The exemption of these latter companies rests upon three conditions:

1. That the company should be "of a purely local character";

2. That its income should consist "solely of assessments, dues, and fees collected from members," and

3. That such assessments, dues, and fees so collected should be "for the sole purpose of meeting expenses."

It is to be noted that Congress in fixing these three conditions showed an intention to limit the exemptions strictly. In the first it used the word "purely," which means "completely, absolutely"; in the second it used the word "solely," which means "only"; and in the third it used the word "sole," which means "single," thus making these exemptions emphatically and strictly limited in each case, and excluding therefrom any corporation or association such as this plaintiff is held to be, the conduct of whose business brings it within any one of these conditions; that is to say, if it is not "of a purely local character," it is not exempt; if its income is from other sources than fees and dues, it is not exempt; if its assessments and dues are for other purposes than meeting expenses, it is not exempt.

Section 1013 (b) removed only the first one of these conditions on the exemption, that is, "of a purely local character," and Congress, to remove all doubt as to whether it did, provided that it should only apply to "companies otherwise exempt;" that is to say, that the fact that a company was "of a purely local character" did not exempt it if under the other two said conditions, 2 and 3, it was not exempt, and *a fortiori* left it where it was before, under section 231.

Syllabus

unaffected by section 1013 (b) and as if the latter had never been enacted, which disposes of the plaintiff's claim to exemption.

As plaintiff was not exempt under section 1013 (b), it could be held, as was held in the *Hardware Underwriters case*, that to be exempt under section 231 it must be of "a purely local character." That plaintiff is not such a company is too evident from the facts to need discussion. It exchanged contracts of indemnity, and reinsured with other companies outside of the State of New York.

Another consideration is that repeated efforts were made in Congress to obtain legislation exempting reciprocal or interinsurance exchanges, such as the plaintiff, but they failed until the revenue act of 1926, 44 Stat. 40, was passed, when they were included in the exemptions of section 231. This last act, of course, has no application to this case.

We hold also, as we held in the *Hardware Underwriters case*, that the burden is on the plaintiff to show that it is within the exemption, which it has failed to do in this case. *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514, 520; *Cornell* v. *Coyne*, 192 U. S. 418, 431; *Phoenix Insurance Co.* v. *Tennessee*, 161 U. S. 174, 177; *Frank H. Mesce* v. *United States*, 64 C. Cls. 481, 495 (certiorari denied), and *New York Trust Co.* v. *United States*, 63 C. Cls. 100, 102 (certiorari denied).

The petition should be dismissed, and it is so ordered.

SINNOTT, *Judge;* GREEN, *Judge;* MOSS, *Judge;* and BOOTH, *Chief Justice*, concur.

HOWARD M. HANNA, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF H. MELVILLE HANNA, DECEASED, v. THE UNITED STATES [1]

[No. H-344. Decided April 1, 1929 [2]]

On the Proofs

Estate-transfer tax; trust fund; power to revoke; power to appoint by will.—Decedent created a trust fund the income from which

[1] Certiorari denied.
[2] Motion for new trial overruled Nov. 4, 1929.

was to be paid to him for life, said trust fund upon his death to be transferred and delivered as he might by will appoint, or in default of such appointment share and share alike among his descendants, the power being reserved to him to revoke the trust in whole or in part during his lifetime. He did not exercise either the power to revoke or the power to appoint by will. *Held*, that the trust fund, so created, was subject to the Federal estate-transfer tax.

Same; revenue acts of 1918 and 1921; continuity of tax; date of death determinative of statute.—It was the intention of Congress that the application of the estate-transfer tax should be continuous as between the revenue acts of 1918 and 1921 and that the date of decedent's death should determine the applicable statute.

Same; saving clause of 1921 act; definition of "accrue."—

(1) The saving clause, section 1400 (b) of the revenue act of 1921, continuing the 1918 act "in force for the assessment and collection of all taxes which have accrued under the revenue act of 1918" applies to taxes that were imposed or established by the law at the time of repeal as a liability, notwithstanding they did not become due and payable until some time after the new act went into effect.

(2) Under the maxim *expressio unius est exclusio alterius* section 214 (a) (3) of the revenue act of 1921 raises the implication that elsewhere in the act the accrual date of taxes is to be taken as other than the due date thereof, unless the context otherwise indicates.

Claim for refund of taxes; suit against United States; change in basis of claim.—A claim made to the Commissioner of Internal Revenue for refund of an estate-transfer tax on the ground that legal title to the interest taxed had passed to trustees and remainder vested in the issue of decedent before his death, is on a different and distinct ground from a claim made that estates of decedents dying within one year prior to November 23, 1921 (revenue act of 1921), are not subject to the tax.

See also *Warner-Patterson Co. v. United States, post*, p. 237.

The Reporter's statement of the case:

Mr. Heber Smith for the plaintiff. *Carter, Ledyard & Milburn* were on the brief.

Mr. Fred K. Dyar, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Messrs. Dwight E. Rorer, C. M. Charest* and *Ottamar Hamele* were on the brief.

Reporter's Statement of the Case

The court made special findings of fact, as follows:

I. On May 9, 1912, H. Melville Hanna executed and delivered to trustees a deed of trust whereby he transferred to such trustees certain notes and securities. The said deed of trust provided that the net income of these securities constituting the trust fund was to be paid to the grantor during his life, and upon his death the trust fund was to be transferred and delivered as he might by his will appoint, or in default of such appointment, share and share alike among his descendants, with a certain provision with reference to his wife not material to the decision in the case. A power was reserved to the grantor alone to revoke the trust either in whole or in part at any time during his lifetime. The grantor did not exercise either the power to revoke or the power of appointment by will. At the time of the execution of the deed of trust, the grantor delivered to the trustees the securities therein referred to duly indorsed. A copy of said deed of trust is attached to the petition marked "Exhibit B" and is made a part hereof by reference.

II. H. Melville Hanna died February 8, 1921, a resident of Georgia, leaving a will under which the plaintiff, Howard M. Hanna, was named as executor. The Federal estate-tax return filed by the executor showed a net estate of $968,-573.09, and an estate tax of $48,982.97. The return described the trust established by the decedent on May 9, 1912, but did not include the value of the transfer as part of the taxable estate.

III. On audit and review of the tax return, the Commissioner of Internal Revenue found the value of the trust estate to be $10,514,250.00, and included this amount in the taxable estate which he determined to have a value of $11,771,930.25. He found the total tax to be $2,124,482.56, and so assessed it. Of the tax so determined, the sum of $2,049,326.97 resulted from the inclusion in the taxable estate of the value of said trust estate. The tax so found and assessed by the commissioner was paid by the executor. In due time, the executor filed a claim for a refund of the said sum of $2,049,326.97, basing the application for the re-

fund on the claim that the amount of the trust estate had been erroneously included in the taxable estate.

The court decided that plaintiff was not entitled to recover.

MEMORANDUM BY THE COURT

This case is identical with that of *Reinecke* v. *Northern Trust Co.*, decided by the Supreme Court on January 2, 1929 [278 U. S. 339], so far as the decision applies to the first two trusts involved in that case. In both cases the decedent and grantor reserved the power to revoke the trust. In fact, the instant case is stronger against the plaintiff in that the trust instrument also provided that on the death of the decedent and grantor the trust property should be transferred and delivered as he might by his will appoint, or in default of such appointment, share and share alike among his descendants. It is clear under the holding in the *Reinecke case* that the trust fund was properly included in the taxable property of the estate. This ruling disposes of the only question in the case, and it follows that plaintiff's petition must be dismissed. It is so ordered.

OPINION ON MOTION FOR NEW TRIAL

GREEN, *Judge*, delivered the opinion of the court:

The motion for a new trial being based upon a ground neither argued nor stated at the time of the submission of the original case, and being supported by a decision of a United States District Court, would seem to be entitled to an expression of the opinion of this court thereon.

Although the point was not raised on the original submission of the case, it is now insisted by plaintiff that under the revenue act of 1921, 42 Stat. 227, estates of decedents dying within one year prior to the enactment of the revenue act of November 23, 1921, are not subject to the Federal estate tax.

The act of 1921 repealed that portion of the 1918 revenue act which imposed an estate tax and enacted in lieu thereof a different estate tax applicable when the new statute went into force. The act of 1921, however, contained what is

commonly referred to as a "saving clause" similar to one which was contained in the 1918 act, the purpose of which was plainly to continue in force the provisions of the 1918 act until the 1921 act could apply. This provision was contained in section 1400 (b) of the later act, which provided:

"(b) The parts of the revenue act of 1918 which are repealed by this act shall (unless otherwise specifically provided in this act) remain in force for the assessment and collection of all taxes which have accrued under the revenue act of 1918 at the time such parts cease to be in effect, and for the imposition and collection of all penalties or forfeitures which have accrued or may accrue in relation to any such taxes. In the case of any tax imposed by any part of the revenue act of 1918 repealed by this act, if there is a tax imposed by this act in lieu thereof, the provision imposing such tax shall remain in force until the corresponding tax under this act takes effect under the provisions of this act."

The contention of plaintiff is that there is no provision for the act of 1918 to "remain in force for the assessment and collection of all taxes" unless those taxes have "accrued," and that the decedent in this case having died within one year prior to the enactment of the 1921 act, no taxes had "accrued" against his estate. If this theory be correct, then estates of those who died more than one year prior to the enactment of the 1921 act would be taxed, and estates of those who died after the enactment of the 1921 act would also be taxed; but in the case of those who died in the intervening period no tax would be imposed. No one would claim that Congress ever intended to enact a law having such absurd and inequitable results, but, however justifiable the presumption may be that it did not so intend, it is not necessary for us to indulge in it in order to ascertain the purpose of this "saving clause." A casual survey of the provision set forth above clearly shows that the intent and purpose of Congress was that the estates of all of those who died prior to the enactment of the 1921 act should be taxed under the 1918 statute, and the estates of those who died after the enactment of the 1921 act taxed under the provisions of the later act. In fact, this intent is so plain that "he who runs may read" and understand. It needs no citation of authorities

to show that when the intent of the legislative body is manifest it becomes our duty to so construe the act as to carry out that intention unless such a construction can not reasonably be placed upon the language of the act. A careful examination of the whole of the revenue act of 1921 leads us to conclude that defendant's case is even stronger than this principle requires, and that the only reasonable construction which can be given the provision in question is one which would sustain the tax in controversy.

It will be observed that the argument of plaintiff is based upon a definition of the word "accrue" or "accrued," and it is claimed that the construction for which plaintiff contends is supported by the decisions of the Supreme Court in *United States* v. *Woodward*, 256 U. S. 632, and *United States* v. *Mitchell*, 271 U. S. 9, 10. In connection with the application of these decisions some confusion of thought seems to have arisen. The question for determination in the case at bar is not how the word "accrued" may have been used in some part of the 1918 statute, but how it is used and what meaning should be given it in the provisions of the 1921 statute, which we are called upon to construe. When this is kept in mind, we think it will clearly appear that these cases do not support the position of plaintiff.

The word "accrue" as used in the law has two meanings: It is often applied to a present enforceable demand, and as often, if not more often, means simply to arise or to come into existence. In *Emerson* v. *The Shawano City*, 10 Wis. 433, it is said:

"The verb 'to accrue' is often and properly used to convey the same idea as the verb 'to arise.' * * * A cause of action may be said to arise, when the contract out of which it grows is entered into or made."

In *Page* v. *Skinner*, 298 Fed. 731, 735, the circuit court of appeals had occasion to pass on the meaning of a provision in the act of February 24, 1919, commonly referred to as the revenue act of 1918. The 1918 act by section 1400 (a) thereof repealed the estate tax of 1916, but in (b) of the same section provided:

Opinion of the Court

"(b) Such parts of acts shall remain in force for the assessment and collection of all taxes which have *accrued* thereunder, and for the imposition and collection of all penalties or forfeitures which have accrued and may accrue in relation to any such taxes, * * *." (Italics ours.)

Although the wording is slightly changed, there can be no question but that the word "accrued" is used in the same sense as in the similar provision of the 1921 act, which has heretofore been set out, and the circuit court of appeals said further in the last-named case with reference to the 1918 act:

"Neither are we in doubt as to the meaning of the word 'accrued,' found in subparagraph (b); as contended by counsel amici curiae, who appear for another estate in like conditions, that it is equivalent to *arising under* and refers to all taxes, including estate taxes, * * * and is not a restriction to those that were due and payable prior to February 25."

With this construction of the 1918 act we entirely agree, and applying the same rule to the provision of the 1921 act under consideration in the case at bar, it follows that the position now taken by the plaintiff in support of the motion for a new trial is not well founded. In view, however, of the fact that the case of the *Wilmington Trust Co.* v. *United States*, 28 Fed. (2d) 205, cited by counsel holds to the contrary, it is considered that our reasons for following the case of *Page* v. *Skinner*, *supra*, ought to be fully set forth and they accordingly follow.

We do not need to cite authorities to show what the words "accrue," "accrued," or "accrual" mean in a bookkeeping or economic sense. It is well settled both by works on accounting and judicial decisions that books kept on the "accrual" basis include items as to which a liability has arisen or exists either for or against the concern for which the books are kept, although these items matured in the future and were not yet due and payable.

It is said that the provisions of section 214 (a) (3) of the act of 1921 indicated the intention of Congress as to how this word should be construed, and that that construction is the one for which plaintiff contends.

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The provision upon which plaintiff relies in support of this contention, under the heading of "Deductions Allowed Individuals" (parts not material to this case omitted), is as follows:

"(3) Taxes paid or accrued within the taxable year * * *. *For the purpose of this paragraph* estate, inheritance, legacy, and succession taxes accrue on the due date thereof except as otherwise provided by the law of the jurisdiction imposing such taxes." (Our italics.)

It will be observed that this provision applies only to "deductions allowed individuals" and that it is only "for the purpose of this paragraph." The purpose of the paragraph was the allowance of deductions of taxes which had accrued, and for this purpose, and this purpose only, it is provided that estate taxes shall accrue on the due date thereof. The clear implication is that elsewhere the word "accrue" should be taken, when applied to taxes, as meaning the time when they were imposed or established as a liability by the law, at least unless the context otherwise indicates. In fact, it would seem that the maxim *expressio unius est exclusio alterius* here applies, the statute having specifically stated that for the purposes of making deductions estate taxes should accrue on the due date thereof, excludes this meaning for other purposes—that is, for the purposes of the remainder of the act. Broom's Legal Maxims 664. The maxim is a rule of construction. *United States* v. *Barnes*, 222 U. S. 513.

Of course, the context might indicate a different meaning, but, as we have already seen, the context in section 1400 (b) of the act of 1921 plainly indicated the intention of Congress that the application of the estate tax should be continuous and that the 1921 act did not create new exemptions from the tax of 1918.

In this connection it should be noted that exactly the same language is used under the heading of "Deductions Allowed Corporations" in section 234 (a) (3) of the 1921 act. Here again Congress made it clear that it fixed the due date as the time when estate taxes should accrue merely for the purposes of that paragraph; that is, for the purpose of fixing the time when the deductions on account of such taxes should be made.

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In the cases of *United Stataes* v. *Woodward*, *supra*, and *United States* v. *Mitchell*, *supra*, the Supreme Court was construing certain provisions of the revenue acts of 1916 and 1918. The act of 1921 did not enter into either of these cases. In the instant case we are called upon to construe the act of 1921 with additional and different provisions which are controlling, and the decision is governed entirely thereby. The two decisions of the Supreme Court cited above have no application, having been rendered not only under a different statute, but in a different connection.

In the case of *United States* v. *Anderson*, 269 U. S. 422, 441, the case of *United States* v. *Woodward*, *supra*, was reviewed, and it is shown that it was decided on the provisions of the act of 1918. One question in the *Anderson case* was as to when the munitions tax which was imposed in 1916 accrued, and although the tax was not payable until 1917, it was held that "in the economic and bookkeeping sense with which the statute and Treasury decision were concerned, the taxes had accrued" in 1916, thus recognizing that the word "accrue" was generally used in the statute with reference to taxes in "the economic and bookkeeping sense"; that is, as referring to the time when the liability is established instead of the time when it becomes due and payable, if that is a different date. So in this case the estate taxes in question had already "accrued" when the 1921 statute was passed. It was further held in the *Anderson case*, *supra*, that when the books of the corporation were kept on an accrual basis, the deduction for the taxes of 1916 should be made in that year; and that there was nothing in the *Woodward case* to controvert this holding. In fact, an examination of the opinions in the *Anderson case* and the *Mitchell case* shows that in each the application of the *Woodward case* was strictly and expressly restricted to the particular question before the court in that case which was a very different one from the one now being considered.

As the tax became due and payable one year after the decedent's death, it is obvious that it was intended that it should be assessed before the expiration of the year and it is quite plain from other provisions of the 1918 act that the tax might be assessed under regulations made by the com-

missioner even before six months had elapsed since the death of the owner of the estate, provided the regulations so required. The act further provided that the tax should be a lien for 10 years upon the gross estate of the decedent. No date is fixed in the statute from which this 10 years should run, but it seems to have been universally considered that it ran from the date of death of the testator, and the regulations so provided. (Reg. 68, art. 88.) Obviously the lien could not attach at the time of death unless a liability for the tax then came into existence.

It seems unnecessary to carry the argument further, but section 1400 (b) in addition to the particular part thereof which has been discussed above contained the following:

"In the case of any tax imposed by any part of the revenue act of 1918 repealed by this act, if there is a tax imposed by this act in lieu thereof, the provision imposing such tax shall remain in force until the corresponding tax under this act takes effect under the provisions of this act."

Title IV, Estate tax, of the act of 1918, was repealed by the act of 1921; and Title IV, Estate tax, of the act of 1921, was enacted in lieu thereof. The provisions imposing the tax therefore remained in full force and effect up until the time of the enactment of the 1921 act, and the tax having by reason thereof accrued, then under the provisions with reference to taxes which had accrued the provisions of the 1918 act remained in force for the assessment and collection thereof. The provision last quoted becomes entirely meaningless if the construction contended for by the plaintiff be adopted. It would have no application except to cases where the tax was due and payable when the 1921 act was adopted, and for that purpose it would be entirely unnecessary and useless.

For the reasons above stated we decline to accept the views expressed in the case of the *Wilmington Trust Co.* v. *United States*, *supra*, and hold that the tax in question had accrued when the 1921 act went into effect.

Another feature of the case should be noted. The claim of the plaintiff for refund, upon which this suit is based, stated that the assessment in the sum of $2,049,326.97 was made in respect to certain property of which the decedent

had made a transfer on May 9, 1912, to trustees under a deed of trust, the aggregate value of which the commissioner found to be $10,514,250. The claim for refund further recited:

"Upon the execution and delivery of said trust deed, the legal title to all of the securities constituting the trust fund passed to the trustees named therein and the interest in remainder in such trust fund vested in the issue of the decedent immediately, subject only to be devested in certain contingencies provided for in said deed; and inasmuch as the said vested interests of such remainderman were never so devested, pursuant to the provisions of said deed, the undersigned now claims that said transfer so made by said decedent on May 9, 1912, is not subject to tax under the United States estate tax law, pursuant to which this return is made."

It will be observed that while it was claimed that the trust fund was "not subject to tax under the United States estate tax law," the basis of this claim was as stated in the foregoing paragraph which does not refer in any way to the claim now made, nor was there elsewhere in the claim for refund any reference to it. That the claim originally made is not the same as the one now argued is shown by the argument contained in the application for refund which is based on the cases of *Shwab* v. *Doyle*, 258 U. S. 529, and *Coolidge* v. *Nichols*, 4 Fed. (2d) 112. These cases had some bearing on the original claim made in the application for refund, but it will not be contended that they have the slightest application to the claim now made by the motion for a new trial.

We think the claim now made by plaintiff on motion for a new trial which has been set out and discussed in this opinion is a different and distinct ground from that presented to the commissioner. If we are correct in this, the plaintiff is in any event barred from recovery herein under the rule laid down in *Kaltenbach* v. *United States*, 66 C. Cls. 581; *Warner-Patterson Co.* v. *United States* [*post*, p. 237]; and *Red Wing Malting Co.* v. *Willcuts*, 15 Fed. (2d) 626.

It follows that the motion for a new trial must be overruled, and it is so ordered.

GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

BOUSH CREEK LAND CORPORATION v. THE UNITED STATES

[No. C-772. Decided May 6, 1929[1]]

On the Proofs

Eminent domain; damages to land; just compensation.—In Virginia a riparian owner owns in fee simple to low-water mark, and plaintiff, owning land in that State on which the Federal Government in dredging operations has deposited mud and silt between high and low water, has interfered with the drainage of plaintiff's land and its access to a navigable stream, and has impaired the navigation thereof, is entitled to just compensation for the resulting depreciation of market value, as for a taking for which a promise to pay should be implied.

The Reporter's statement of the case:

Mr. Edmund S. Ruffin, jr., for the plaintiff. *Mr. Lester S. Parsons* was on the briefs.

Messrs. J. Robert Anderson and *George Dyson*, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. Plaintiff is a corporation duly organized and existing under the laws of the State of Virginia, with its principal office in the city of Norfolk.

II. Plaintiff, at the time this cause of action is alleged to have arisen was, and still is, the sole owner in fee simple of all those certain tracts of lands on Boush Creek in the State of Virginia together with the riparian rights thereto belonging, as alleged in its petition.

III. The waters of Boush Creek, prior to the hydraulic dredging operations conducted by the United States Army contained a navigable channel sufficient for the use of small boats, and its navigability was recognized by the United States War Department, and no bridges or other structures could be built across the said navigable waters without the

[1] Motion for new trial overruled Nov. 4, 1929.

proper permit therefor having been first obtained from the War Department. All of the bridges and structures crossing the said Boush Creek were required by the Government to be built with ample clearance and passageway for small boats and with the right reserved by the War Department to require the said bridges to be changed in the discretion of said War Department to drawbridges at any time when the demands of navigation might require it or it was deemed necessary or was desired by the War Department.

Prior to the time of the said hydraulic dredging operations by the United States Army, Boush Creek was a tidal stream approximately a mile and a half long and varying in width from its mouth to its head, the channel being about four hundred feet wide at its mouth and gradually narrowing down to about fifteen feet at its head. Its banks were fairly high and partly wooded, but between the banks and the low-water mark there existed marsh ground, on which there was considerable growth of marsh grasses. From the east side of said Boush Creek to low-water mark on the west side thereof the stream was of considerable volume and depth and was generally navigable for small boats in the channel for practically its entire length. The mean rise and fall of the tide was 2.6 feet and the channel was navigable its entire length at high water for boats drawing three feet of water. Generally speaking, the bed and banks of the stream were firm and solid. Residents living on the boundaries of Boush Creek were accustomed to using it for convenience, pleasure, fishing, and boating, through the use of small motor boats, skiffs, and rowboats. The drainage of the land adjacent to and bordering on Boush Creek was well defined.

The only damage sought to be recovered by plaintiff in this proceeding is as set out in paragraph "D" (tracts D and E), on page 8 of plaintiff's printed petition. The remaining allegations of damage, involving other lands owned by the petitioner and described in the original petitions as tracts A, B, and C, have been withdrawn.

IV. By reason of the hydraulic dredging operations of the United States in the year 1918 through the agency of the War Department, in the building and completion of

what is commonly known as the United States Army base at Norfolk, Virginia, large quantities of mud and silt were dumped into the headwaters of Boush Creek, which partly filled the same with a deposit of soft, slimy mud and left an unsightly, ugly marsh, created an insanitary condition, impaired the natural drainage of the said land to such an extent that its complete restoration could not be effected except at very heavy cost, and it greatly reduced the ebb and flow of the tide in the bed of Boush Creek, and greatly interfered with navigation and with plaintiff's access to the creek from its adjacent land.

From the headwaters of Boush Creek down to what is designated on the plats as the Belt Line bridge, a deposit of mud and silt some two or three feet in depth was made over the entire bed of the creek; also a deposit of mud and silt about two feet on the banks of the creek between high and low water; and from Belt Line bridge downstream a deposit of approximately one-half foot was made, both over the entire bed of the creek and on the banks between high and low water, which deposit gradually decreased to zero. Defendant knew and foresaw that the natural result of its dredging operations would be the deposit of mud and silt as aforesaid.

V. During the year 1919 and after the United States Army dredging operations had ceased, the Navy Department conducted dredging operations at the mouth of Boush Creek, consisting of the removal of a spit of land containing about ten acres belonging to plaintiff. The taking of this land is not involved in this proceeding. Some silt from the Navy dredging operations was caused to be lodged in Boush Creek for a distance above what is known as the trolley bridge, but the plaintiff in this action asks for no damage in connection with said operation.

VI. Dredging operations of the city of Norfolk took place in the year 1922, four years after the Army's dredging operations had been completed. Said operations did not materially change the conditions theretofore existing and caused by the Army dredging operations, from the headwaters of Boush Creek down to what appears on the plats as the Virginian bridge, to which point only plaintiff is now asking for compensation.

VII. The property of plaintiff referred to in Finding VIII is adaptable for use either as industrial or second-class residential property. It is, however, improbable that the property will be required or used for industrial purposes for a long period of time, but it is immediately adaptable to and may be used as second-class residential property.

VIII. The market value of plaintiff's property has been depreciated by the operations referred to in Finding IV, as follows:

(*a*) The sum of $8.00 a foot for a distance of 650 feet on the frontage between the northern line of the Belt Line Railroad bridge and the southern line of the Virginian Railway bridge, $5,200.00.

(*b*) The sum of $3.00 a foot on the 1,600 feet of property fronting on Boush Creek between the western edge of what is known as the Collins property, as shown on the plat above mentioned, and the southern line of the Belt Line Railroad property, $4,800.00.

(*c*) The sum of $1.00 per foot on 1,600 feet of property fronting on Boush Creek between the eastern edge of what is known as the Collins property, as shown on the plat above mentioned, and the source of the creek, $1,600.00.

IX. There was evidence offered of other damage to the property of the plaintiff for a distance of 2,200 feet north of the Virginian Railway bridge and to the mouth of the said creek. The evidence, however, as to this damage was so indefinite, vague, and uncertain that it is impossible to ascertain what damages, if any, were done to this property through the United States Army base dredging operations due to the fact that it was contributed to by two other dredging operations, to wit, the dredging operations of the United States naval base and at the Norfolk City municipal terminals. As to the dredging operations at the United States naval base, a settlement has been had; and as to the dredging operations at the Norfolk City municipal terminals, separate suit was filed by plaintiff against said city of Norfolk.

The court decided that plaintiff was entitled to recover $11,600.00.

SINNOTT, *Judge*, delivered the opinion of the court:

This cause involves the taking of plaintiff's property and riparian rights by defendant. Plaintiff at the time the cause of action arose was and still is the owner in fee of the tracts of land described in the petition herein situated on Boush Creek in the State of Virginia, together with the riparian rights thereto belonging. Plaintiff's land was bordered on its southern and western boundaries by Boush Creek, a navigable, tidal stream a mile and a half long, and varying in width from four hundred feet at its mouth to about fifteen feet at its head. Between the banks at low-water mark there existed marsh ground on which there was a considerable growth of marsh grasses. From the east side of said Boush Creek to low-water mark on the west side thereof the stream was generally navigable for small boats in the channel for practically its entire length. The mean rise and fall of the tide was 2.6 feet and the channel was navigable its entire length at high water for boats drawing three feet. Residents living on the boundaries of Boush Creek were accustomed to using it for convenience, pleasure, fishing, and boating, through the use of small motor boats, skiffs, and rowboats. The drainage of the land adjacent to and bordering on Boush Creek was well defined.

In the year 1918 defendant conducted hydraulic dredging operations in the building and completion of the United State Army base at Norfolk, Virginia. In these dredging operations large quantities of mud and silt were dumped into the headwaters of Boush Creek and partially filled the same with a deposit of soft, slimy mud and left an unsightly, ugly marsh and created an insanitary condition, impaired the natural drainage of plaintiff's land to such an extent that its complete restoration could not be effected except at a very heavy cost; also the ebb and flow of the tide in the bed of Boush Creek was greatly reduced, navigation was interfered with, as well as plaintiff's access to the creek from its riparian land. From the headwaters of Boush Creek down to the Belt Line bridge a deposit of mud and silt some two or three feet in depth was made over the entire bed of the creek, also on the banks of the creek between high and low water, and from the Belt Line bridge downstream a deposit

Syllabus

of approximately one-half foot was made, both over the entire bed of the creek and on the banks between high and low water, which deposit gradually decreased to zero. Defendant knew and foresaw that the natural result of its dredging operation would be the deposit of mud and silt in Bousch Creek and on plaintiff's riparian lands between high and low water.

The deposit of mud and silt on plaintiff's riparian lands between high and low water, the interference with the drainage of plaintiff's lands as well as with its access to the creek, and impaired navigation, all due to defendant's operations, as set forth in Finding IV, depreciated the market value of plaintiff's lands in the sum of $11,600, as set forth in Finding VIII.

The plaintiff as a riparian owner in Virginia owns in fee simple to low-water mark. *Norfolk City* v. *Cooke*, 27 Grat. 430; *Taylor* v. *Commonwealth*, 102 Va. 759; Va. Code, 1918, Sec. 3574.

In our opinion, under the authority of the cases cited, *infra*, the operations of defendant amounted to a taking of plaintiff's property, from which a promise for compensation should be implied: *United States* v. *Great Falls Manufacturing Co.*, 112 U. S. 645; *United States* v. *Lynah*, 188 U. S. 445; *United States* v. *Cress*, 243 U. S. 316; *Portsmouth Harbor Land & Hotel Co.* v. *United States*, 260 U. S. 327.

Judgment should be ordered in favor of plaintiff, and it is so ordered.

GREEN, *Judge;* MOSS, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

GREENFIELD TAP & DIE CORPORATION v. THE UNITED STATES [1]

[No. F–157. Decided May 6, 1929 [2]]

On the Proofs

Contracts; delays; apportionment of responsibility.—Where both parties to a contract are responsible for delay in its per-

[1] Certiorari denied.
[2] Motion for new trial overruled Oct. 21, 1929.

formance the court will not undertake to apportion the responsibility.

Same; maximum fee; excessive cost of performance.—Where a contract provides for a maximum fee to the contractor, the mere fact that the provision was improvident as far as the contractor is concerned, the actual cost of performance having greatly exceeded the fee, does not entitle the contractor to more than the specified maximum.

The Reporter's statement of the case:

Mr. A. Henry Walter for the plaintiff.

Mr. Percy M. Cox, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. Plaintiff, the Greenfield Tap & Die Corporation, is now and was during all of the times hereinafter mentioned, a corporation duly organized under the laws of the State of Massachusetts, and engaged in the business of manufacturing tools, gauges, etc., with its office and principal place of business at Greenfield, in the State of Massachusetts.

II. During the months of March and April, 1917, several conferences were had between Government representatives and representatives of plaintiff corporation in reference to plaintiff manufacturing for the Government master gauges for the Springfield rifle. As a result of these conferences a formal written contract was entered into by and between the Government of the United States, represented by W. B. Pierce, colonel, Ordnance Department, United States Army, and commanding officer of the Springfield Armory, and plaintiff corporation, by the terms of which contract plaintiff corporation obligated itself to furnish all labor and material required for the proper performance of the following work:

(a) To determine accurately all tolerances in dimensions of parts of the United States rifle, caliber 30, model of 1903, now actually being used in the manufacture of that rifle at the Springfield Armory, and to place the tolerances so determined upon standard drawings of that rifle, adding to the existing drawings such other drawings upon an enlarged

scale as may be required in order to show all of the tolerances clearly and without confusion.

(b) To examine the present set of working gauges with the object of determining what changes in the set are necessary or advisable in order to provide maximum and minimum gauges for every tolerance shown on the drawings when revised under (a) above, and to make accurate detailed drawings of all new gauges or modifications of old gauges that are required to carry out the intent of this paragraph.

(c) To design such new master reference gauges, or modifications of the master gauges now in use at the Springfield Armory, as may be required to provide quick and accurate means for checking the accuracy of all the working gauges determined under (b) above, to make accurate and detailed drawings of all new or modified master reference gauges, and to manufacture and deliver to the Springfield Armory two (2) complete sets of master reference gauges, which would not vary in any essential dimensions more than one ten-thousandth of an inch from, in the case of newly designed master reference gauges, the dimensions of the drawings of such gauges, and, in the case of the duplication of existing master gauges, from the corresponding dimensions of the latter gauges.

And the United States agreed to pay plaintiff $1.50 per hour for each of its employees actually engaged in the performance of the contract; the cost of all raw material used in the work, not including that required for tools or shop equipment, at its cost to the contractor, f. o. b. Greenfield, Massachusetts, plus fifteen per cent of such cost; and the actual necessary travel and living expenses of any of its employees who were required, in the performance of this work, to go away from the place of their usual employment, provided that the payments to the contractor under the contract should in no event exceed a total of $100,000, and in the event the entire work contemplated by the contract was not satisfactorily completed when the total payments due reached the sum of $100,000, the contractor was obligated to complete the remaining work without further compensation of any kind.

By the terms of said contract a set of master reference gauges was understood to mean the number of such gauges required for the quick and accurate checking of every working gauge provided for under the contract.

The written contract was approved by William Crozier, brigadier general, Chief of Ordnance, United States Army, under date of May 16, 1917. All work contemplated by the contract was to be completed within six months from the date of approval. A true copy of said contract is filed with plaintiff's petition, marked "Exhibit A," and is made a part of these findings by reference.

III. Immediately following the execution of the contract plaintiff corporation began making the necessary designs that were to be used in the performance of said contract and made arrangements with other manufacturers, principally manufacturers who were proposing to manufacture Springfield rifles in quantity for the Government, to assist it in the performance of the contract by lending to plaintiff engineers, draftsmen, gauge makers, and mechanics to perform work for plaintiff in the performance of the contract. Shortly after the contract was signed the Ordnance Department decided not to use the Springfield-model rifle in quantities, but to use the Enfield rifle, and as a result of this change the manufacturers who were proposing to manufacture the Springfield rifle, and who had agreed to lend plaintiff corporation mechanics to assist it in the performance of its contract with the Government, withdrew said offer of assistance.

IV. Under date of July 25, 1917, Colonel George Montgomery of the Ordnance Department wrote plaintiff in reference to the performance of the work under the first contract, as follows:

"Your attention is invited to the enclosed copy of a communication received from the Chief of Ordnance relative to concentrating as much as possible on artillery ammunition gauges. You will see from this correspondence that Springfield Armory authorizes you to hold up temporarily the design and manufacture of rifle gauges in order to concentrate on gauges for mobile artillery ammunition.

"It will be understood, however, that the suspension on the work of designing and manufacture of rifle gauges does

Reporter's Statement of the Case

not apply to the manufacture of gauges for small-arms ammunition, which like gauges for artillery ammunition, are also urgently needed, as deliveries are now being made of small-arms ammunition by a number of companies."

In reply thereto plaintiff, on August 23, 1917, wrote the commanding officer of the Springfield Armory as follows:

"We hand you herewith copy of letter of July 25 from the commanding officer at the Frankford Arsenal to the Greenfield Tap and Die Corporation; also enclose copy of letter of July 17 which was enclosed with the Frankford letter.

"These letters, we assume, confirm the verbal instructions from you to our Mr. D. G. Baker, given about the time the original contract was signed, to the effect that an extension of time on the rifle gage contract would be made to compensate for any interference with this contract caused by us giving full and unlimited precedence to the gage work authorized by the Frankford Arsenal. And we have governed ourselves in accordance with your instructions, with the intent of asking you to arrange some modification of the completion date stated in the original rifle-gage contract as soon as we could form a reasonable estimate of the amount of time lost.

"The rifle-gage contract was signed by the Chief of Ordnance on May 16. Several days previous to this date we had secured engineers and measuring experts who could have been started at once on the work. In accordance with your permission, however, we used all of this force in preparing drawings and placing factory orders for the 3-inch and 2.95 mobile field artillery gages.

"Therefore, Mr. Robert Libby, whom we had selected as engineer in charge of the preliminary work in Springfield, did not begin to organize his department in the armory until May 28, and only two men of the required six measurers began work on June 11.

"Our original time estimates were based upon detailed figures, which total 15,000 man-hours for the preliminary engineering and measuring work, including the design of such new gages as we might feel warranted in submitting for your consideration. We estimated also, that 40,000 man-hours would be required to execute the physical work of actually making and inspecting two sets of master gages as ultimately authorized.

"You will note that these 40,000 hours of physical work would employ fifty men approximately four months. These

men, of course, would have to be the highest-grade gage makers. Our original time schedule called for starting this work not more than two months from the date the contract was signed. We should, therefore, have started this physical work about July 16. On account of the delays referred to above, it now appears impossible to start this work before September 15 in any case, and if we do start on September 15, it can only be *with men who, at that time, would be occupied on Frankford gage work.* We assume, therefore, that we have lost about two months in the engineering or preliminary work up to date.

"Our engineers in charge of the Frankford gage work tell us that the contracts now in hand can occupy every available man until the middle of November. If, therefore, we carry out fully the wishes of the Frankford Arsenal, expressed in the letter of July 25, we will be actually about four months behind in starting the Springfield master gages.

"It also may be well to place on record at this time, that since we have commenced our work of collecting the data for determining tolerances allowed in actual practice at Springfield, it has been found desirable to do twice as much measuring as we had at first estimated. We believe this additional measuring will greatly increase the value of our work to the armory and that it will be an insurance against confusion and differences when the master gages are being actually manufactured. This matter, it is understood, has been arranged orally between yourself and our Mr. Baker.

"We now have employed at Springfield upon the preliminary work a complete organization, and excellent progress is being made. We do not believe that any material advantage would accrue to the Frankford work if we were to interfere in any way with this Springfield organization. We do believe, however, that the Frankford requirements would suffer on any attempt of ours to start the physical work on the Springfield master gages on September 15 as would now be possible.

"In view of the above considerations, we request that you grant us an extension of five months on the original Springfield master gage contract, which will mean that the completion date of this contract will be April 16, 1918."

Under date of September 12, 1917, Colonel W. B. Pierce, of the Ordnance Department, wrote plaintiff stating that in view of the urgency of orders for artillery ammunition gauges plaintiff was authorized to delay the completion of the work under the contract for rifle master gauges for a

period of five months. Under date of December 9, 1918, plaintiff corporation wrote the commanding officer of the Springfield Armory requesting an extension of time for the completion of the work under the contract dated April 20, 1917, until the end of the year or to January 1, 1920.

On December 27, 1918, plaintiff addressed another communication to the commanding officer of the Springfield Armory, as follows:

"In accordance with our letter to you of December 9th, we desire to present for your consideration the matter of this company being permitted to manufacture additional sets of master gages for the Springfield rifle.

"It is felt that additional sets of master gages may be used to good advantage by the Government, either at its Springfield or Rock Island Armories, and that the present is an opportune time to place such an order, to permit their economical manufacture in conjunction with sets to be manufactured by us in the immediate future under our existing contract.

"If orders could be placed to permit their manufacture coincidentally with the sets now on order, we would propose to produce one additional set of master gages, in accordance with approved design, for $50,000 net, and for each additional set thereafter a price of $40,000. As we understand you are now considering the practice of using Johanssen gage blocks rather than individual test pieces in connection with the master gages to be furnished under the present contract, this price is based upon such assumption.

"In connection with this proposal it is felt only proper to advise you that the first contract has been distinctly a disappointment to us. We have spent considerably more for engineering expense than we anticipated, due to delays beyond the control of the contracting parties, and the mounting cost of labor has confronted us with a loss in the cost of making the master gages even before the actual construction has commenced.

"In consequence the prices quoted above may seem somewhat in excess of our original quotation. We wish, however, to emphasize that the price is not in excess of the value of the gages or of their probable cost in the event of our receiving an order for the second or third set.

"Should this suggestion of ours for securing an additional order meet with favorable consideration it would be possible to complete these gages and deliver same with the master gages now on order.

"We should be glad also to have you consider at this time the placing of orders for working gages in accordance with the designs which will be agreed upon by you and our engineers."

Under date of December 30, 1918, Lieutenant Colonel Lindley D. Hubbell replied to plaintiff as follows:

"In reply to your letters of Dec. 9th and Dec. 27th, this office does not feel justified in granting you an extension of your contract No. 50, dated April 20th, 1917, until January 1, 1920, but will grant an extension until July 1, 1919.

"While there have been many delays in the carrying out of this contract, some of them beyond your control, we do not feel that the work is nearly so far along as it should be at the present time. The delays mentioned in your letter of the 27th, caused by your concentrating on artillery and ammunition gauges, would have applied, provided you had been in a position to actually manufacture the gauges on our contract, but we fail to see where they are responsible for the delays in getting through the drawings incorporating the proposed tolerances, or in any preliminary work leading up to the manufacture of the gauges."

On account of the war conditions supervening shortly after the execution of the contract, dated April 20, 1917, and because of the competition among manufacturers of firearms for skilled labor, the plaintiff was unable to obtain the services of qualified gauge makers, but was only able to employ toolmakers and others unskilled in the work of gauge making and, consequently, its plant was not sufficiently manned and was not physically capable of completing the work within the six months required after the approval of the contract.

On the other hand, if the Government had not delayed the performanace of the contract, and the manufacturers who proposed to manufacture Springfield rifles for the Government had loaned plaintiff a sufficient number of engineers, draftsmen, and mechanics, plaintiff could have completed its contract within the time prescribed therein.

V. Under date of May 3, 1919, plaintiff and the Government of the United States, represented by Lieutenant Colonel Lindley D. Hubbell, Ordnance Department, United States Army, the commanding officer of the Springfield Armory, entered into a second formal written contract by the terms

of which plaintiff obligated itself to furnish all labor and materials required and to deliver f. o. b. Springfield Armory one complete set of templets and master gauges, in addition to, and to be an exact duplicate of the two sets that were being manufactured by contractor under its contract with the Government dated April 20, 1917, for the sum of $50,000 for the complete set. Said contract was approved in writing by C. C. Williams, major general, United States Army, Chief of Ordnance. A copy of said contract is filed with plaintiff's petition, marked "Exhibit B," and is made a part of these findings by reference.

VI. Under the date of May 28, 1919, plaintiff wrote the commanding officer at Springfield Armory as follows:

"SIR: Referring to your letter of Mar. 25, 1919, by Lt. Willis, in regard to time extension required for the manufacture of master gages under the Springfield Armory rifle-gaging contract.

"Since receiving your letter the order for the third (3rd) set of master gages has been given to us, so our estimate on extension of time includes this set.

"*Summary of the present conditions—Gage drawings* (*includes working & master gage drawings*).—1. It looks now as if you will have in our hands by July 1, 1919, all necessary data for completing the gage drawings, but it will be impossible for us to get completed gage drawings to you so they may be approved before July 1, 1919, as mentioned in your letter.

"*Total master gages to be manufactured.*—It is impossible at present to tell how many master gages are to be made, but we have estimated that there will be approximately the quantities as follows:

	Master gages (one set)	Master gages (three sets)
Size blocks	600	1,800
Specials	625	1,875
Total	1,225	3,675

"To date there are a few master gages completed, but there will be probably 125,000 mfg. hours required to complete the balance. We are equipped to supply 2,000 mfg. hours per week, which would take over a year to finish the gages.

"*Recommendations for the future.*—This work to date has progressed beyond the uncertain stage so that we have been able to outline the following policy whereby S. A. [Springfield Armory] and G. T. D. [Greenfield Tap & Die Corpn.] will not have to increase their working forces to any great extent, also will give the G. T. D. an opportunity to manufacture the majority of the master gages.

"*Gage drawings (includes working & master-gage drawings)*.—These are to be presented to S. A. and returned to G. T. D. at the rate of 10 per cent per month beginning June 1, 1919, as will be shown in the weekly progress report—the last drawing to be submitted by G. T. D. for approval not later than Mar. 1, 1920, and returned before April 1, 1920.

"*Manufacturing of master gages.*—Orders are to be placed for manufacturing immediately or as soon as practicable after receipt of approved master-gage drawings from S. A.

"*Extension of time required.*—Basing our estimate on the above figures we solicit an extension of time to July 1, 1920.

"Now, if it is convenient to get the gage drawings completed and approved earlier than Jan. 1, 1920, we solicit six (6) months' time from the date of receipt of the last gage drawing.

"Trusting you may approve the above policy and grant us an extension of time to July 1, 1920, we remain.

"Yours respectfully,

"GREENFIELD TAP & DIE CORPORATION."

Under date of June 4, 1919, Lieutenant Colonel Hubbell wrote plaintiff corporation as follows:

"In answer to yours of May 28th, an extension of your contracts No. 50 dated April 20, 1917, and that of May 3, 1919, will be granted on the following conditions:

"First, that the last master gauge of the three (3) sets now on order will be completed not later than six (6) months after receipt by you of the last approved drawing for these master gauges.

"Second, the contracts mentioned must be completed on or before July 1st, 1920.

"You may disregard the letter of May 3rd from this office, which instructed you not to start work on the approved designs for master gauges until the approved tolerances on the component had been received from the Ordnance Department, as the difference between the submitted tolerance and the approved tolerance will in all cases be a matter of a very few thousandths. You may proceed with

these gauges up to the point of grinding and finishing to size. The final dimensions of the gauging points must not, however, be finished until the receipt by you of the approved Ordnance drawing. It is understood that the allowance for grinding and finishing will, in all cases, be more than ample to cover any slight changes in tolerances.

"Every effort must be made by you to expedite this work, and the design drawings of master gauges submitted to this armory will be approved as rapidly as possible.

"Regarding the drawings for working gauges covered by your contracts, these drawings will be submitted with the master-gauge drawings for the same component and operation. The design of these gauges will be approved at the time the master gauge is approved at this armory, but these drawings will not be returned to you until the final tolerances have been received from Washington and incorporated on these drawings. The return of either master-gauge drawings or working-gauge drawings will be interpreted to mean prints only—the tracings to be retained at this armory."

Under date of June 3, 1920, Colonel T. L. Ames, of the Ordnance Department, wrote plaintiff stating that an extension of time for the completion of both contracts would be granted plaintiff to December 31, 1920, upon the condition that completion by that time was dependent upon the prompt decision by the Springfield Armory of the kind of screw threads to be used and certain dimensions on barrel gauges.

Under date of December 23, 1920, plaintiff wrote the Commanding Officer of the Springfield Armory as follows:

"Confirming yesterday's conference between Major MacFarland and our Mr. A. W. Schoof we beg to advise that it will be necessary for us to request an extension of time beyond January 1st, 1921, for the completion of the master gauges which we are making for Springfield Armory on contracts 50 & 4851.

"We would prefer not to again set a definite date for completion of this work, but we wish to assure you that very special pressure is being brought upon same so as to insure completion at the very earliest possible date.

"We further understand that you will in the very near future be in position to release to us the necessary information covering the gauges for barrel and screw threads, which up to this time has been withheld by you, in order that we may begin serious work on these items. It is understood

that you will have our full cooperation on these remaining items in completing their design.

"Kindly advise us if the foregoing is agreeable to you."

Under date of January 4, 1921, Colonel T. L. Ames, of the Ordnance Department, wrote plaintiff as follows:

"Your letter of December 23, 1920, relative to gauging contracts PO 50 and 4851, has been received. In conference with Mr. Schoof it was concluded that the Greenfield Tap & Die Corporation would probably be able to finish all of the contracts with the exception of the barrel and thread gauges by July 1, 1921. In view of this conclusion it will be agreeable to this armory to extend the time limit for the entire contract, with the exception of the thread and interior barrel gauges, to July 1, 1921. Inasmuch as the drawings for the interior of the barrel and threads have not yet been approved, this armory will grant an indefinite extension on this part of the work until such time as the drawings are approved.

"The drawings for all screw threads have gone to Washington, and it is hoped will be approved very soon. The drawings for the outside of the barrel have been approved and are here ready for your use. How soon the drawings for the interior of the barrel can be furnished it is not possible to say, for a long firing test for the purpose of determining the correct dimensions is still in progress.

"Inasmuch as only about four per cent of the incompleted work will be held up on account of drawings not yet approved by the Ordnance Department, it is hoped that the balance of the contract will be completed as soon as possible. Although there is no pressing present need for the undelivered gauges, this armory is anxious to have the contract completed, and every effort will be made to facilitate the work of the Greenfield Tap & Die Corporation."

VII. Under date of May 6, 1922, plaintiff wrote the commanding officer of the Springfield Armory as follows:

"With reference to your letter of May third in which you request completion of our work on gauge contracts No. 50 and No. 4851 in time for complete inspection and acceptance by June 30, 1922, we find ourselves unable to commit ourselves definitely on this matter, particularly because approximately one hundred and fifty uninspected gauges are still at Springfield Armory.

"We have eighty master gauges here for repairs and nine which have not yet received your initial inspection, and we doubt our ability to have a final shipment of these items to Springfield Armory before the end of July.

"Among the rejected gauges now with us are several which were made in accordance with drawings approved by Springfield Armory, but are not now acceptable to your inspection department because of its question of design or dimension.

"Cases of the kind mentioned in the preceding paragraph have caused us considerable extra work, for which we expect additional compensation, and they are responsible for some of the delay of completion of the entire work.

"In view of the foregoing, and of the fact that the work still with us is, on an average, 80% complete and that we have made to date 99.5% initial shipments, we respectfully solicit your action to secure a reallotment of funds which will enable us to obtain settlement on these contracts without extraordinary effort.

"Attached please find progress report to May 5, 1922."

This letter was answered under date of May 8, 1922, as follows:

"We are in receipt of your letter of the 6th instant with reference to the completion of your gauge contracts numbers 50 and 4851 in time to complete inspection and acceptance by June 30, 1922. It is regretted that such a large number of gauges have accumulated at this armory which must be inspected, and an extra force is being put upon them to finish the work up at the very earliest practicable date. We will take steps to return to you promptly any that require further attention from you in order to give you an opportunity of getting at them as early as possible. It is suggested that you ship here the nine which have not yet had an inspection by us at your earliest convenience.

"It seems important to the undersigned to wind this contract up, if practically possible, before June 30th, and complete the payment on it, as after that date, as previously stated, special appropriation will have to be obtained from Congress, and much delay must ensue.

"It is understood that your Mr. Schoof will visit this armory early this week, and it is hoped that a conference may be had with him, having in view the early completion of the contract. It is the understanding of this office that it will be impossible to comply with your suggestion to make any change in the allotment of funds used for paying these contracts, as funds obligated to pay a contract must have been appropriated prior to the date upon which the contract was entered into, and no such funds are available, having been or to be turned into the Treasury of the United States on June 30th."

Reporter's Statement of the Case

VIII. Both of the contracts were completed in the latter part of June or the early part of July, 1922. The Government delayed the performance of the contract dated April 20, 1917, in many instances, and on account of such delays the Government extended the time for the performance of said contract from time to time. The last extension fixed the time for completion as of June 30, 1922. These delays were caused by the failure of the Ordnance Department to approve drawings and specifications promptly, and by the Ordnance Department changing specifications, drawings, and methods of gauging after the same had been approved by the department; also by the failure of the Government to promptly inspect gauges as delivered. The drawings for the barrel and thread gauges were not approved by the Ordnance Department until 1921, and in May, 1922, many of the gauges that had been delivered by plaintiff had not been inspected by the Government officials.

In the early stages of the contract the Government inspectors required that the tolerance on the gauges should not exceed one ten-thousandths of an inch and that the degree of hardness required should be at least 70 scleroscope. These requirements caused plaintiff to incur additional expense in making over rejected gauges or replacing them with new gauges.

IX. Plaintiff did not keep cost accounts of the two contracts separately, and subsequent to the execution of the second contract the cost accounts of both contracts were kept jointly. It does not appear from the evidence what the cost of performance under the first contract, the same being the contract dated April 20, 1917, would have been if the contract had been completed within the six months' period fixed by the contract for the completion thereof.

The total cost of performance for both contracts was the sum of $265,492.43. This included the sum of $5,300.93 for gauges purchased from other manufacturers; $8,124.40, expenses of engineers; $56,830.05, labor of engineers; $121,-637.80, labor; $616.57 for material; and $72,982.68 overhead. Plaintiff received payment of $100,000 on the first contract and $50,000 on the second contract, or a total of $150,000.

The difference between the total cost of performance under both contracts and the amount paid under both contracts is $115,492.43.

The court decided that plaintiff was not entitled to recover.

GRAHAM, *Judge*, delivered the opinion of the court:

This suit arises out of two contracts, the first a cost-plus contract dated April 20, 1917, for the supplying of two sets of gauges. It was to be completed in six months and the contract provided that—

"It is mutually agreed that the payments due the contractor under this contract shall in no event exceed a total of one hundred thousand (100,000) dollars, and in case the entire work contemplated by this contract shall not have been satisfactorily completed when the total payments due have reached the sum of one hundred thousand (100,000) dollars, the contractor shall complete the remaining work without further compensation of any kind."

The second contract was dated May 3, 1919, and was for an additional set of gauges, under which the contractor was to furnish the labor and material and to be paid the sum of $50,000 for the "complete set," to be a duplicate of the two sets to be supplied under the first contract. It does not appear when the second contract was to be completed. At the time this contract was entered into the two sets of gauges contracted for under the first contract had not been completed and delivered. The two contracts were completed some time about the latter part of June or first of July, 1922. The plaintiff was paid the $100,000 called for under the first contract and the $50,000 under the second contract.

The plaintiff claims that by reason of the conduct of the officers in being too exacting and capricious as to the details and quality of the gauges, and also due to changes in drawings by the defendant's officers, its work was delayed and its expenses increased, and that by reason thereof the work cost $311,678.86 for the two contracts, instead of $150,000 as provided by them.

As to the claim that the conduct of the officers in being too exacting as to the character of the work caused delay, the first contract provides, Article V, that:

"If any doubts or disputes shall arise as to the meaning of anything in this contract, the matter shall be referred to the Chief of Ordnance, United States Army, for determination. If, however, the contractor shall feel aggrieved at any decisions of the Chief of Ordnance, he shall have the right to submit the same to the Secretary of War, whose decision shall be final."

But, aside from this, there is no satisfactory proof of how much of this claimed loss was due to this action of the officers. As to delays, the plaintiff asked for extensions of time, and extensions of time were granted. The time for the completion of the first of the contracts was October, 1917. It does not appear that it was completed until about June, 1922, nor was the second contract completed until more than three years after it was entered into.

These contracts, one being a cost-plus contract and the other the ordinary contract where plaintiff was to furnish labor and material, stand each on a different footing, and the work under the two can not be commingled for the purpose of a recovery here. The facts show that the additional expenditures claimed by reason of delays and otherwise were not segregated and kept separately for each contract, but were intermingled in such a way that it is not possible to ascertain and allot a given portion to each contract, and so it can not be determined, even if plaintiff were entitled to recover, how much it would be entitled to recover for the claimed loss on each contract.

The claim for losses by reason of the delays, even if satisfactorily proven, would not be recoverable, for the reason that there is evidence of delays through the action of the plaintiff as well as through the action of the defendant, and this court has held that where both parties to a contract are responsible for delay in its performance the court will not undertake to apportion the responsibility for the delays. See *Plack and Deal, etc.*, v. *United States*, No. E–487, decided February 4, 1929 (66 C. Cls. 641); *Caldwell & Drake* v. *Schmulbach*, 175 Fed. 429; *Jefferson Hotel Co.* v. *Brum-*

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baugh, 168 Fed. 867, 875 (C. C. A., 4th Cir.); and *Vilter Manufacturing Co.* v. *Tygart's Valley Brewing Co.*, Id., pages 1002, 1005, and cases cited.

But, further, the first contract provided in express terms the maximum amount to be paid, viz, $100,000, and that in no event should the payments to the contractor under the contract exceed that amount, and that if the contract was not satisfactorily completed when payments to that amount had been made, the contractor should complete the remaining work without further compensation of any kind.

This may have been an improvident provision as far as plaintiff is concerned, but it is the contract which it made and by which it must abide. *Stewart-McGehee* v. *United States* (58 C. Cls. 1, 9). It was paid and accepted $100,000, so far as appears from the findings, without protest or objection.

The second contract was entered into at the solicitation of the plaintiff before the first contract had been completed, and after plaintiff had been working under the first contract for more than two years.

The petition should be dismissed, and it is so ordered.

SINNOTT, *Judge;* GREEN, *Judge;* MOSS, *Judge;* and BOOTH, *Chief Justice*, concur.

UTICA KNITTING CO. v. THE UNITED STATES [1]

[No. H–275. Decided May 6, 1929 [2]]

On the Proofs

Profits tax; consolidated return; affiliated companies; cessation of subsidiary's business.—Where two companies, one a parent and the other a subsidiary, are affiliated within the meaning of section 1331 (b) of the revenue act of 1921, the cessation of business by the subsidiary and the liquidation of its affairs do not relieve them from the profits tax due under a consolidated return for the period of liquidation.

Same; intercompany transactions.—The purpose of section 1331 of the revenue act of 1921 was to treat affiliated corporations as an entity, or a business unit, and to eliminate intercompany transactions.

[1] Certiorari denied.

[2] Motion for new trial overruled Nov. 4, 1929.

The Reporter's statement of the case:

Mr. Warnick J. Kernan for the plaintiff. *Messrs. Harry A. Fellows, Francis K. Kernan* and *Willis D. Morgan* were on the brief.

Mr. Charles R. Pollard, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. Wright Matthews* was on the brief.

The court made special findings of fact, as follows:

I. The plaintiff is a domestic corporation duly organized in 1891 and reorganized in 1911, under the laws of the State of New York, with its principal office in the city of Utica, in said State, and engaged in the manufacture of knit underwear.

II. On or about July 11, 1910, the plaintiff purchased certain patent rights in a special mesh knitting machine at a price of $50,000, which sum was fully paid.

III. On May 24, 1912, a company known as the Airyknit Company, which name was subsequently changed to Unitee Knitwear Company, was organized by the plaintiff with an authorized capital stock of $100,000, and engaged in the manufacture of knit underwear.

IV. From August 3, 1912, to December 31, 1912, both dates inclusive, the plaintiff purchased and held until the complete liquidation of Unitee Knitwear Company, the entire capital stock of the said Airyknit Company, subsequently designated Unitee Knitwear Company, for $100,000, paying therefor as follows:

In cash	$20,000
Mesh knitting machine patent rights	50,000
Goods and merchandise	30,000
Total	100,000

V. For its investment of $100,000, in the Airyknit Company, as set out in Finding IV above, the plaintiff received capital stock of said Airyknit Company of March 1, 1913, par value of $100,000.

VI. On December 31, 1916, plaintiff erroneously charged off against surplus $80,000 of its investment in the stock of

said Unitee Knitwear Company. This item was later taken by the plaintiff as a loss for the year 1917 and as such was allowed for income-tax purposes by the Commissioner of Internal Revenue.

VII. Within the time required by law, to wit, on or before March 1, 1917, plaintiff made and filed with the United States collector of internal revenue for the twenty-first district of New York, its Federal income-tax return for the year 1916, but did not claim therein, as a deduction, the $80,000 erroneously charged to surplus in 1916 as a loss on account of its investment in the stock of said Unitee Knitwear Company, nor was the said $80,000 claimed as a deduction in an amended Federal income-tax return filed by plaintiff for the year 1916 on or before March 1, 1917.

VIII. At a meeting of the board of directors of said Unitee Knitwear Company, held on June 30th, 1915, it was resolved that said company go into liquidation, and that the officers of said company be empowered to take all necessary steps to that end; that the corporate books and records of said Unitee Knitwear Company disclose the following facts:

Said Unitee Knitwear Company manufactured no products and incurred no expense or liabilities during the year 1917; said company had no receipts during said year, except the sum of $821.06, which was received in payment of property sold prior to said year; said company, during said year, had no disbursements except the sum of $10.21 made in payment of debts incurred prior to said year, and except the disbursements made to the plaintiff, as set out in Finding IX hereof; and no sales of property or services were made by said Unitee Knitwear Company to any person, firm, or corporation during said year.

IX. On January 1, 1917, there was due the plaintiff, on open account, from said Unitee Knitwear Company, the sum of $56,015.30; and during the year 1917 sales of property were made by said Unitee Knitwear Company to the plaintiff, as follows:

Date of sale	Nature of property	Sales price
April 30, 1917	Raw material	$1, 273. 00
April 30, 1917	Real estate	1, 573. 70
April 30, 1917	Machinery and equipment	23, 610. 17
Total		26, 456. 87

The purchase price of the property so sold to the plaintiff by said Unitee Knitwear Company was applied toward the payment of said open account of $56,015.30, and, in addition, said Unitee Knitwear Company, during said year, made the following cash payments to the plaintiff on said open account:

Date of payment:	Amount
March 7, 1917	$1, 000. 00
May 2, 1917	500. 00
December 24, 1917	442. 07
Total	1, 942. 07

leaving a balance due on said open account as of December 31, 1917, of $27,616.36.

X. During the month of December, 1917, said Unitee Knitwear Company wound up its business and affairs, as above set forth, but plaintiff did not and never has received payment of said sum of $27,616.36 due on open account, and did not and never has received a liquidation dividend or dividends on account of its ownership of $100,000 par value of the capital stock of said Unitee Knitwear Company.

XI. On December 31, 1917, plaintiff charged off as a loss its investment of $100,000 in the stock of said Unitee Knitwear Company, and on said date, in addition, charged off as a loss $27,623.27, being the balance shown on its books as due from said Unitee Knitwear Company on open account, the total deduction on said date being $127,623.27.

XII. On or about April 1, 1918, plaintiff filed with the United States collector of internal revenue for the twenty-first district of New York its Federal income and profits tax returns for the year 1917, including therein the gross income and deductions of its subsidiary, Commercial Warehouse Company, and claimed therein, along with its other

deductions, a loss of $47,623.27, being made up by combining $20,000 charged off in 1917 as a loss sustained by its investment in the stock of said Unitee Knitwear Company, with a loss of $27,623.27 due from that company on open account. On June 15, 1918, plaintiff paid to the United States collector of internal revenue for the twenty-first district of New York the sum of $104,283, being the amount of tax shown to be due on said return.

XIII. As a result of an audit of the books of the plaintiff for the years 1916 and 1917, the Commissioner of Internal Revenue determined and so advised the plaintiff by letter dated February 2, 1921, that the net loss sustained by the plaintiff on account of its said investment of $100,000 in the stock of said Unitee Knitwear Company and said unpaid open account of $27,623.27 was $77,623.27, being the whole loss of $127,623.27 less $50,000, the claimed value, at the time of their reversion of the patent rights above mentioned which, in June, 1916, reverted to the plaintiff; and, further, said loss of $77,623.27 had been sustained during the year 1916, and because of this determination plaintiff had overpaid its income tax for the year 1916 by $3,543.45 and there was due for the year 1917 an additional income and excess profits tax of $34,633.18, making the net additional tax $31,-090.73; and the said additional tax of $34,633.18 was paid by the plaintiff to the collector of internal revenue for the twenty-first district of New York on April 23, 1921, by taking credit for $3,543.45 and payment in cash of $28,261.63 and abatement of $2,728.90.

XIV. Thereafter and about April 25, 1921, plaintiff duly filed a claim for abatement in the amount of $2,728.90 of the additional 1917 tax with the collector of internal revenue for the twenty-first district of New York, and on or about May 18, 1921, a claim for refund in the amount of $14,992.83, or such greater amount as was legally refundable on account of the alleged overpayment of income and profits taxes for the year 1917.

XV. Pursuant to the provisions of subdivision (d) of section 250 of the revenue act of 1921, plaintiff prepared a waiver consenting to a determination, assessment, and collec-

tion by the Commissioner of Internal Revenue of the amount of income, excess profits, or war profits taxes due under any return made by or on behalf of the plaintiff for the year 1917, irrespective of any period of limitation, which said waiver was filed with the Commissioner of Internal Revenue on February 3, 1923.

XVI. By certificate of overassessment No. 168048 from the Commissioner of Internal Revenue, dated September 6, 1923, plaintiff was advised that said claim for abatement for $2,728.90, and said claim for refund of $14,992.83, had been considered and allowed as follows:

Abated	$2, 728. 90
Credited to 1916 tax	1, 321. 29
Refunded	6, 407. 83
Total	10, 458. 02

and said refund of $6,407.83 was duly paid to plaintiff with interest, from April 25, 1921, to July 7, 1923, on $7,729.12, being the amount of said refund plus said credit of $1,321.29.

XVII. Plaintiff prepared and on January 10, 1924, duly filed with said United States collector of internal revenue for the twenty-first district of New York another claim for refund in the amount of $155,549.39 for income and profits taxes overpaid for the years 1916, 1917, 1918, and 1919, referring therein to briefs filed with the Commissioner of Internal Revenue.

XVIII. In the said claim for refund filed on January 10, 1924, plaintiff asked for a refund of $61,480.65, income and profits taxes for the year 1917, upon the ground, among others, that the Commissioner of Internal Revenue, in computing said taxes for said year, had failed to allow as a loss said investment of $100,000, in the stock of the said Unitee Knitwear Company, and said unpaid balance on open account of $27,623.27 as a deduction for the year 1917 for both income and excess-profits tax purposes.

XIX. In the audit of plaintiff's income-tax return for the year 1916, in connection with said claim for refund filed on January 10, 1924, the Commissioner of Internal Revenue reversed his former action of allowing $27,623.27 as a 1916 loss and allowed the said sum of $77,623.27 as a deductible

loss for 1917. This action by the said commissioner increased the net income of the plaintiff for the year 1916 in the amount of $77,623.27 by denying as a deduction for that year the $77,623.27 previously allowed by him as a loss on account of plaintiff's investment in the stock of the said Unitee Knitwear Company and the said unpaid balance of open account of $27,623.27. In a letter dated August 11, 1924, the plaintiff was notified that an additional tax was due because of this disallowance with the explanation:

"(b) This item represents a loss which has been allowed as a deduction from income for the taxable year 1916. Based upon information submitted in your brief dated December 11, 1923, this item is a loss properly deductible in the year 1917 and therefore reversed in this audit."

XX. In the audit of plaintiff's income-tax return for the year 1917, in connection with said claim for refund filed on January 10, 1924, the Commissioner of Internal Revenue increased the deduction of $47,623.27 claimed in that return as a loss on account of its investment in stock of said Unitee Knitwear Company and said unpaid balance due from said company on open account, to $127,658.31, being the loss sustained by the plaintiff by reason of its purchase for $100,000 of all the stock of the said Unitee Knitwear Company, and by reason of the unpaid open account of $27,616.36 due on the books of that company to plaintiff.

XXI. In the audit of plaintiff's income-tax return for the year 1917, the Commissioner of Internal Revenue allowed the sum of $127,658.31 as a deduction on account of the loss sustained by the plaintiff in its transactions with the Unitee Knitwear Company as heretofore set out. But in the audit of plaintiff's consolidated profits tax return for the said year 1917 the Commissioner of Internal Revenue disallowed the deduction of this $127,658.31 for profits-tax purposes, thereby increasing the consolidated net income of the plaintiff for the year 1917 for profits-tax purposes in the sum of $127,658.31. Plaintiff was advised of this action by letter dated August 11, 1924, Schedule 3, revised, thereof as follows:

"(a) Explanation of this loss as set forth on page 3 of your brief for 1917 has been accepted for purposes of the normal tax only. However, for excess-profits-tax purposes

this amount can not be considered a deductible item to the consolidation, in accordance with office procedure of the consolidated audit division."

XXII. In a brief submitted to the Commissioner of Internal Revenue on September 15, 1924, plaintiff contended that said loss of $127,658.31 was a proper deduction for the year 1917, for both income and profits-tax purposes.

XXIII. In a letter dated July 25, 1925, the Commissioner of Internal Revenue refused to allow said loss of $127,658.31 as a deduction for the year 1917 for profits-tax purposes.

XXIV. In said letter dated July 25, 1925, the plaintiff was advised of a refund with respect to its 1917 income and profits taxes in the amount of $19,413.63, which amount was duly paid to plaintiff, with interest thereon from April 26, 1921, to August 4, 1925, amounting to $4,979.20.

XXV. If judgment is entered for the plaintiff the amount should be $29,997.36 with interest on $25,235.83 thereof from June 15, 1918, and on $4,761.53 thereof from April 25, 1921.

XXVI. At the date of the filing of this suit on July 1, 1927, less than two years had elapsed since the disallowance on July 25, 1925, by the Commissioner of Internal Revenue of the part of said claim for refund dated January 9, 1924, to which this suit relates.

XXVII. The taxes paid by plaintiff to the collector of internal revenue for the twenty-first district of New York on account of 1917 income, were duly turned over by the said collector to, and deposited in, the Treasury of the United States of America.

The court decided that plaintiff was not entitled to recover.

SINNOTT, *Judge*, delivered the opinion of the court:

The plaintiff seeks to recover $29,997.36, with interest, paid as excess-profits tax for the year 1917, on the ground that the Commissioner of Internal Revenue refused to allow a deduction of $127,658.31 represented as a loss sustained by plaintiff in its transactions with one of its subsidiary companies.

As we view it, the sole question in the case is whether it is proper to eliminate intercompany transactions among affili-

ated corporations in determining the excess-profits tax for the calendar year 1917 under the provisions of Title II of the revenue act of October 3, 1917, 40 Stat. 302, and section 1331 of the revenue act of November 23, 1921, 42 Stat. 319.

On May 24, 1912, the plaintiff organized a company known as the "Airyknit Company," which name was later changed to "Unitee Knitwear Company," with a capital stock of $100,000. The plaintiff transferred to the newly organized company its patent rights in a special mesh-knitting machine, which had cost plaintiff $50,000, and plaintiff received therefor $50,000 par value of the capital stock of the new company. Thereafter capital stock of the new company was acquired by the plaintiff in the par value of $20,000, for cash; also goods and merchandise were transferred to the new company and paid for by the transfer of $30,000 of its capital stock at par. In this manner the plaintiff between August 3, 1912, and December 31, 1912, became the owner of all the capital stock of the Unitee Knitwear Company.

While it was not so stipulated, both the plaintiff and the Unitee Knitwear Company engaged in the manufacture of knit underwear. This is shown by plaintiff's consolidated income-tax return for the year 1917, and by the testimony of Henry Fischer, bookkeeper of plaintiff.

In June, 1915, the board of directors of the Unitee Knitwear Company resolved that the company should go into liquidation. As a result thereof the company wound up its business and affairs during the month of December, 1917.

During the year 1917 the Unitee Knitwear Company manufactured no products; incurred no expenses or liabilities; had no receipts, except $821.06 from transactions prior to this year; made no disbursements, except $10.21 in payment of debts incurred prior to this year; and no sales of property or service were made, except to the plaintiff.

On January 1, 1917, there was due the plaintiff on open account from the Unitee Knitwear Company $56,015.30. Between March 7, 1917, and December 24, 1917, this account was reduced by transfer of property of the Unitee Knitwear Company to plaintiff and payments in cash, as set forth in Finding IX, leaving a balance due the plaintiff as of December 31, 1917, of $27,616.36 due on the open ac-

count, and $100,000 on account of the stock of the Unitee Knitwear Company.

On or about April 1, 1918, the plaintiff duly filed its income and profits tax returns for the year 1917, claiming certain deductions, and paid the taxes therein disclosed. Further taxes were paid and adjustments of the taxpayer's accounts were made.

On January 10, 1924, the plaintiff filed a claim for refund in regard to its 1917 taxes, upon the ground, among others, that the Commissioner of Internal Revenue had failed to allow as a loss its investment of $100,000 in the stock of the Unitee Knitwear Company, and the unpaid balance on the open account, amounting to $27,623.27, as a deduction for the year 1917, both for income and excess-profits tax purposes.

Upon the audit of the plaintiff's income-tax return for 1917, in connection with the January 10, 1924, claim for refund, the Commissioner of Internal Revenue allowed the sum of $127,658.31 as a deduction on account of the loss sustained by the plaintiff in its transactions with the Unitee Knitwear Company. However, in the audit of the plaintiff's consolidated-profits tax return for 1917 the Commissioner of Internal Revenue disallowed the deduction of said sum for excess-profits tax purposes on the ground that such deduction could only be allowed for normal tax purposes and could not be considered in determining the excess-profits tax of the consolidation.

We think that the Commissioner of Internal Revenue was correct in disallowing the sum of $127,658.31 as a deduction, with reference to plaintiff's excess-profits tax, on account of the loss sustained by plaintiff in its transaction with its subsidiary and affiliated company, the Unitee Knitwear Company.

Plaintiff's excess-profits tax for the year 1917 became due under Title II, of the revenue act of October 3, 1917, 40 Stat. 302. Section 1331 of the revenue act of 1921, 42 Stat. 319, requires consolidated returns, under said Title II of the revenue act of 1917, for affiliated corporations.

The following are the pertinent provisions of said section 1331:

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"CONSOLIDATED RETURNS FOR YEAR 1917

"SEC. 1331. (a) That Title II of the revenue act of 1917 shall be construed to impose the taxes therein mentioned upon the basis of consolidated returns of net income and invested capital in the case of domestic corporations and domestic partnerships that were affiliated during the calendar year 1917.

"(b) For the purpose of this section a corporation or partnership was affiliated with one or more corporations or partnerships (1) when such corporation or partnership owned directly or controlled through closely affiliated interests or by a nominee or nominees all or substantially all the stock of the other or others, or (2) when substantially all the stock of two or more corporations or the business of two or more partnerships was owned by the same interests: *Provided*, That such corporations or partnerships were engaged in the same or a closely related business, * * *.

"(c) The provisions of this section are declaratory of the provisions of Title II of the revenue act of 1917."

The plaintiff and its subsidiary, the Unitee Knitwear Company, were clearly affiliated, under the terms of said section 1331. The plaintiff owned all the stock of the subsidiary company. Both companies were engaged in the same business, namely, the manufacture of knit underwear.

We can not agree with the contention of plaintiff that the fact that the subsidiary company in 1917 manufactured no products, incurred no expenses or liabilities, that its sole activities were to collect certain accounts and to pay certain debts, to wind up its affairs, and to turn over to plaintiff all its property, in any way relieves plaintiff and its subsidiary from the provisions of section 1331, above quoted. The relations between plaintiff and the Unitee Knitwear Company continued, and they were a unit until the latter company was finally liquidated in December, 1917.

It would be an extremely technical evasion of the purpose of the statute to hold that a conceded affiliation ceases when the subsidiary ceases to sell and manufacture goods, while at the same time the parent company owns all the stock of the subsidiary, and the subsidiary continues in business for the purpose of winding up its affairs, turning over its property to the parent, collecting its accounts, and paying

its debts, which very debts and accounts arose out of the knitwear business in which both the parent company and the subsidiary were engaged.

The commissioner was correct in refusing to consider the intercompany transactions between plaintiff and its subsidiary, with reference to the excess-profits tax. The very purpose of section 1331 of the revenue act of 1921, *supra*, was to treat affiliated corporations as an entity, or a business unit, and to eliminate intercompany transactions.

This purpose is well stated in Senate Report No. 617, 65th Cong., 3d sess., pp. 8, 9, in explaining section 240 of the revenue act of 1918, 40 Stat. 1081, as follows:

"Provision has been made in section 240 for a consolidated return, in the case of affiliated corporations, for purposes both of income and profits taxes. A year's trial of the consolidated return under the existing law (referring to articles 77 and 78 of Regulations 41, wherein the Commissioner of Internal Revenue may require affiliated corporations to file consolidated returns for the purpose of computing their excess-profits tax liability for the taxable year 1917) demonstrated the advisability of conferring upon the commissioner explicit authority to require such returns.

"So far as its immediate effect is concerned, consolidation increases the tax in some cases and reduces it in other cases, but its general and permanent effect is to *prevent evasion which can not be successfully blocked in any other way.* Among affiliated corporations it frequently happens that the accepted intercompany accounting assigns too much income or invested capital to company A and not enough to company B. This may make the total tax for the corporation too much or too little. If the former, the company hastens to change its accounting method; if the latter, there is every inducement to retain the old accounting procedure, which benefits the affiliated interests, even though such procedure was not originally adopted for the purpose of evading taxation. As a general rule, therefore, improper arrangements which increase the tax will be discontinued, while those which reduce the tax will be retained.

"Moreover, a law which contains no requirement for consolidation puts an almost irresistible premium on a segregation or a separate incorporation of activities which would normally be carried on as branches of one concern. Increas-

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ing evidence has come to light demonstrating that the possibilities of evading taxation in these and allied ways are becoming familiar to the taxpayers of the country. While the committee is convinced that the consolidated return tends to conserve, not to reduce, the revenue, *the committee recommends its adoption not primarily because it operates to prevent evasion of taxes* or because of its effect upon the revenue, *but because the principle of taxing as a business unit what in reality is a business unit is sound and equitable and convenient both to the taxpayer and to the Government.*" (Italics ours.)

In *Appeal of H. S. Crocker Co.*, 5 B. T. A. 537; *Appeal of Farmers Deposit National Bank and Affiliated Banks*, 5 B. T. A. 520; and *United Drug Company* v. *Nichols*, 21 Fed. (2d) 160, it was held that the Commissioner of Internal Revenue could not tax as income the gain on intercompany transactions. Also, in *Mackechine Bread Company* v. *Commissioner*, 5 B. T. A. 883; *Appeal of United States Trust Company*, 1 B. T. A. 901; *Appeal of Thomas Publishing Company*, 3 B. T. A. 686, the Commissioner of Internal Revenue was sustained in disallowing intercompany losses. On the general proposition that intercompany transactions should be eliminated in computing consolidated net income and consolidated invested capital, see:

Buffalo Forge Company et al v. *Commissioner*, 5 B. T. A. 947.

Appeal of Hartford & Connecticut Railroad Co., 2 B. T. A. 211.

Appeal of Gould Coupler Company, 5 B. T. A. 499, 517–519.

Gulf Oil Corporation v. *Lewellyn*, 248 U. S. 71.

We are of the opinion that the plaintiff and the Unitee Knitwear Company were affiliated in the year 1917, and that the commissioner was correct in refusing to deduct the intercompany loss of plaintiff in the sum of $127,658.31, and that plaintiff's petition should be dismissed. It is so ordered and adjudged.

GREEN, *Judge;* MOSS, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

CHARLES A. McALLISTER v. THE UNITED STATES

[No. F-244. Decided May 6, 1929 [1]]

On the Proofs

Coast Guard pay; temporary promotion; retirement for disability; act of July 1, 1918.—An officer of the Coast Guard, temporarily promoted under the act of July 1, 1918, retired from active service while holding his temporary rank for physical disability incurred in line of duty, was, notwithstanding the act of April 16, 1908, properly placed upon the retired list at the rank to which he had been promoted.

Statutory construction; conflicting statutes; lack of repeal; harmonious construction.—Where a later statute does not expressly repeal the former, and the two are apparently conflicting, the courts endeavor so to construe them, if possible, as to bring them into harmony.

The Reporter's statement of the case:

Mr. George A. King for the plaintiff. *King & King* were on the briefs.

Mr. Frank J. Keating, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. M. C. Masterson* was on the brief.

The court made special findings of fact, as follows:

I. Charles A. McAllister was originally commissioned a third lieutenant of engineers of the Revenue Cutter Service, June 30, 1892. He continued to serve in successive grades until July 3, 1905, when he was commissioned engineer in chief of the Revenue Cutter Service. He continued by successive reappointments to serve as engineer in chief of that service and since January 28, 1915, under its new name of the United States Coast Guard, until he was informed October 23, 1918, of his temporary promotion to captain in the Navy and colonel in the Army from July 1, 1918, by the Secretary of the Navy, as follows:

[1] Motion for new trial overruled Oct. 21, 1929.

Reporter's Statement of the Case

"You are, by direction of the President of the United States, in accordance with the act of July 1, 1918 (40 Stat. 732), hereby temporarily promoted to have the rank of captain in the Navy and colonel in the Army, from the first of July, 1918."

II. On July 12, 1919, the Secretary of the Navy wrote plaintiff as follows:

"A Coast Guard retiring board, convened by department order of December 28, 1918, in accordance with the provisions of section 5 of the act approved April 12, 1902, found you permanently incapacitated for active service and that such incapacity is an incident of service. The findings of the board have been approved by the President of the United States and, by his direction, you are retired from active service under the provisions of section 6 of the act approved April 12, 1902, as extended by section 3 of the act approved January 28, 1915, and in accordance with section 1 of the act of April 16, 1908, the same to take effect July 12, 1919.

"Your active-duty pay will be up to and including July 12, 1919. Your retired pay will commence on July 13, 1919."

Since that date he has been an officer on the retired list of the United States Coast Guard.

On July 20, 1925, the Secretary of the Treasury wrote the following letter to plaintiff:

"On July 11, 1919, the proceedings, findings, and decision of a retiring board in your case were approved by the President, and, pursuant to his direction, you were retired from active service and placed on the retired list in conformity with the provisions of section 6 of the act approved April 12, 1902, as extended by section 3 of the act approved January 28, 1915. The retiring board found you permanently incapacitated for active service, and that such incapacity is an incident to service.

"At the time of your retirement you were the engineer in chief of the Coast Guard, promoted temporarily to the rank of captain in the Navy and colonel in the Army in accordance with the provisions of the act of July 1, 1918 (40 Stat. 733). The said act of July 1, 1918, provides as follows:

"'That any officer of the Coast Guard temporarily promoted or advanced in grade or rank in accordance with the provisions of this act who shall be retired from active service under his permanent commission while holding such temporary grade or rank, except for physical disability incurred

in line of duty, shall be placed on the retired list with the grade or rank to which his position in the permanent Coast Guard at the date of his retirement would entitle him.'

"As your retirement was effected on account of physical disability incurred in line of duty, you are entitled to retirement in the temporary rank held by you at the date of retirement.

"The department therefore holds your status to be that of engineer in chief, retired, with the rank of captain in the Navy and colonel in the Army, and that you are entitled, on the retired list, to receive seventy-five per centum of the duty pay, salary, and increase of the rank to which you had been temporarily promoted at the time of your retirement."

III. From July 13, 1919, to the present time the plaintiff has received pay as only of the rank of a lieutenant colonel in the Army and of a commander in the Navy.

If paid as a captain in the Navy or colonel in the Army from date of retirement, July 13, 1919, to December 31, 1926, he would receive an additional sum of $2,909.28. Thereafter to the date of judgment the difference is between $317.18 per month, or $3,806.16 a year, at which rate he is being paid, and $362.50 a month, or $4,350 per annum.

The court decided that plaintiff was entitled to recover.

Graham, *Judge*, delivered the opinion of the court:

This case involves the pay of an engineer in chief of the Coast Guard who was retired from the service on July 12, 1919, for physical disability incurred in line of duty.

While serving in the Coast Guard as engineer in chief the plaintiff, by the act of July 1, 1918 (40 Stat. 733), was temporarily promoted to the rank of captain in the Navy and colonel in the Army, and was serving under this promotion at the time of his retirement for physical disability incurred in the line of duty.

The act of April 16, 1908 (35 Stat. 61), provided that the engineer in chief when retired should be retired with the rank of engineer in chief and with the pay of a lieutenant colonel in the Army on the retired list. On examination of plaintiff the Coast Guard retiring board, which convened on December 28, 1918, found that he was permanently incapacitated for active service and that such incapacity was

an incident of the service; that is, that he suffered from physical incapacity incurred in the line of duty. On July 12, 1919, the Secretary of the Navy notified him that he was retired from active service in accordance with section 1 of the act of April 16, 1908, and the previous applicable act of April 12, 1902 (sec. 6), and section 3 of the act of January 28, 1915, retirement to take effect July 12, 1919. This gave the plaintiff only the pay of a lieutenant colonel retired as fixed by the act of 1908.

On July 20, 1925, the Secretary of the Treasury wrote to plaintiff reciting the history of his case and stating:

"As your retirement was effected on account of physical disability incurred in line of duty you are entitled to retirement in the temporary rank held by you at the date of retirement.

"The department, therefore, holds your status to be that of engineer in chief, retired, with the rank of captain in the Navy and colonel in the Army, and that you are entitled, on the retired list, to receive seventy-five per centum of the duty pay, salary, and increase of the rank to which you had been temporarily promoted at the time of your retirement."

The acts involved are in footnote.[1]

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[1] "CHAP. 145. An act to increase the efficiency of the personnel of the Revenue Cutter Service.

"*Be it enacted,* [etc.,] That on and after the passage of this act the President be, and is hereby, authorized to appoint in the Revenue Cutter Service, by and with the advice and consent of the Senate, * * * one engineer in chief for a period of four years who may be reappointed for further periods of four years each, with the rank of a lieutenant colonel in the Army and a commander in the Navy, and who shall have the pay and allowances of a lieutenant colonel in the Army; * * * *Provided,* That the position vacated by an officer appointed * * * engineer in chief shall be filled by promotion according to existing law. * * * *Provided further,* That any officer who shall hereafter serve as engineer in chief shall, when retired, be retired with the rank of engineer in chief and with the pay of a lieutenant colonel in the Army on the retired list," etc.

* * * * *

"Approved, April 16, 1908." (35 Stat. 61.)

"CHAP. 114.—An act making appropriations for the naval service for the fiscal year ending June 30, 1919, and for other purposes.

"*Be it enacted,*" etc.

* * * * *

"That the President be, and he is hereby, authorized during the period of the present war to promote temporarily, with the advice and consent of the Senate, * * * the engineer in chief of the Coast Guard to the rank of captain in the Navy and colonel in the Army," etc.

* * * * *

Opinion of the Court

The question here is whether the plaintiff, having been retired on account of "physical disability incurred in line of duty" while serving with the temporary rank of captain in the Navy and colonel in the Army, should on retirement receive the pay of that rank, or whether he should be retired with the rank and pay provided for under the said act of 1908, which would be the rank of engineer in chief and pay of a lieutenant colonel in the Army, retired. It is plain from the act that had the plaintiff been retired on account of age or for any other reason than physical disability incurred in the line of duty, he would under the act of July 1, 1918, have received the pay fixed by the act of 1908.

The plaintiff contends that the language of the act "except for physical disability incurred in line of duty" clearly indicates that on retirement for physical disability incurred in line of duty he should not have the same pay as a man who had been retired for other causes; that to do this would render the language of the statute meaningless, as the language clearly indicates an intention to except from the rule there laid down for retirement for those temporarily promoted, those who have been retired on account of physical disability; that no other intelligent meaning can be given to the statute, and that the purpose and intent of Congress, as shown by the statute, would be frustrated if the contrary was held.

"That the permanent and probationary commissions of officers of the Coast Guard shall not be vacated by reason of the temporary promotions and advancements authorized by this act, nor shall said officers be prejudiced in their relative lineal rank in regard to their promotion as provided for in existing law: *Provided*, That no officer who shall receive a temporary promotion or advancement under this act shall be entitled to pay or allowances except under such promotion or advancement.

* * * * *

"That any officer of the Coast Guard temporarily promoted or advanced in grade or rank in accordance with the provisions of this act who shall be retired from active service under his permanent commission while holding such temporary grade or rank, except for physical disability incurred in line of duty, shall be placed on the retired list with the grade or rank to which his position in the permanent Coast Guard at the date of his retirement would entitle him.

* * * * *

"That nothing contained in this act relating to the Coast Guard shall operate to reduce the rank, pay, or allowances that would have been received by any person in the Coast Guard except for the passage of this act.

* * * * *

"Approved, July 1, 1918." (40 Stat. 704, 732, 733.)

Where there are two apparently conflicting statutes, it is the policy of the courts to construe them so as to harmonize them, if possible, without necessarily holding that the later repealed the former where there is no express repeal. We think it is possible to do this in this case. The act of 1908 was passed in time of peace and was clearly intended to apply to the ordinary routine of promotion and retirement of the Coast Guard. The act of July 1, 1918, was clearly a temporary war measure. The promotion under it was temporary and the act provided specifically that where an officer promoted thereunder was retired from active service under his permanent commission while holding such temporary rank or grade, he should be retired with the rank or grade of his permanent position in the Coast Guard and not the temporary one given him under the act, except where retired "for physical disability incurred in line of duty." In other words, the rank or grade on retirement of these temporarily promoted officers was not to be affected by the temporary promotion except where the retirement was due to physical disability incurred in line of duty; and while the act does not say that in such case they shall be retired with the rank or grade of the temporary promotion, the conclusion is irresistible that such was the intention of Congress. It was simply a temporary exception to the basis of retirement fixed by the act of 1908, and applied only to the limited number of officers who had received the temporary promotion. It said in effect that while generally an officer's temporary promotion should not affect his rank and pay on retirement, yet where there had been physical disability incurred in line of duty an exception should be made, and it can be readily seen, as the country was at war, why this exception should be made and why it was just and proper that it should be. It did not repeal the act of 1908. It made a temporary exception to its application.

There is another view of this act which tends to support the conclusion we have reached, and it is that presumably Congress was aware of the practice of the Navy Department to give to an officer holding a temporary rank and retiring while holding that rank, the retired pay of that rank. And

in passing, it is to be noticed that section 9 of the act of 1917, 40 Stat. 86, contains a similar provision with regard to officers of the Navy and of the Marine Corps, that where they are retired for any other reason than physical disability incurred in line of duty they shall be retired with the pay of their permanent and not their temporary rank.

It was held by this court in the *Remey case* (33 C. Cls. 218), that the Judge Advocate General, a temporary appointment, who became by reason of the appointment a colonel of the Marine Corps, could be retired with the pay of a colonel, that is, to the temporary office. And in the case of *Paymaster General Edwin Stewart*, United States Navy (5 Comp. Gen. 821), the decision of the comptroller was to the same effect. These decisions would naturally control the departments in the matter of retired pay of officers holding temporary appointments. With knowledge of this Congress apparently intended that this rule should not apply to officers temporarily promoted in the Navy and Marine Corps under the said act of 1917, and in the Coast Guard under the act of July 1, 1918, and so stated, allowing the rule, however, to remain in force where the retirement was due to physical disability incurred in line of duty.

Even the act of 1908, remembering that the chief of engineers was a chief engineer temporarily promoted to that office, which he held for four years, allowed such engineer in chief when retired to be retired with that rank and with the retired pay of that rank, which was a lieutenant colonel in the Army on the retired list. Also, the comptroller, on August 13, 1920, construing this act of July 1, 1918, held that an officer in the Coast Guard holding the temporary rank of captain and retired on account of disability received in line of duty, was retired with the rank and entitled to the retired pay of a captain in the Navy or a colonel in the Army, as claimed by the plaintiff in this case.

Congress, by the act of January 12, 1923 (42 Stat. 1131), gave to the chief of engineers in the Coast Guard on retirement the rank of engineer in chief and the pay of captain on the retired list, and the said action of the Secretary of the Treasury in 1925 in giving him the rank and retired pay of captain in the Navy and colonel in the Army was but

Syllabus

in accordance with the evident purpose and intent of Congress and the previous decision of the comptroller.

In the light of the history and decisions and the wording of the act, and the weight which should be given to its construction by the officer whose duty it is to execute it, we conclude that plaintiff is entitled to recover $4,185.79, $2,909.28 of which is the difference between the retired pay of lieutenant colonel received by him and the retired pay of captain in the Navy or colonel in the Army from July 13, 1919, to December 31, 1926, as found by the comptroller, and the balance, $1,276.51, is the difference between $317.18 per month, which plaintiff is now being paid, and $362.50 per month, the retired pay of captain in the Navy and colonel in the Army from December 31, 1926, to date of judgment. Judgment should be entered accordingly.

SINNOTT, *Judge;* GREEN, *Judge;* Moss, *Judge;* and BOOTH, *Chief Justice*, concur.

SWIFT & COMPANY v. THE UNITED STATES[1]

[No. J–226. Decided May 6, 1929[2]]

On the Proofs

Internal revenue taxes; allowance of credits and refunds; respective authority of a collector and of the Commissioner of Internal Revenue.—A collector of internal revenue has no authority to allow either refunds or credits, that authority being vested in the Commissioner of Internal Revenue, and being judicial in nature, it can not be delegated to the collector.

Same; determination of date of allowance of credit; statute of limitations.—Where overassessments of internal revenue taxes exceed outstanding unpaid taxes and result in a credit and a refundable balance, the credit is "allowed" within the meaning of the statute when the Commissioner of Internal Revenue signs the schedule of refunds and credits, and the statute of limitations, prescribing the time within which a claim for refund may be filed, does not begin to run, as to the tax against which the credit is made, until such allowance.

[1] Certiorari granted.

[2] Motion for new trial overruled Dec. 2, 1929.

The Reporter's statement of the case:

Mr. G. Carroll Todd for the plaintiff. *Messrs. Albert H. Veeder, Henry Veeder, Francis E. Baldwin* and *T. Hardy Todd* were on the briefs.

Mr. Fred K. Dyar, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Messrs. Ottamar Hamele* and *Isadore Graff* were on the brief.

The court made special findings of fact, as follows:

I. The plaintiff is, and at all the times in question was, a corporation organized and existing under the laws of Illinois, with its principal office and place of business at the city of Chicago in that State.

At all the times in question it was engaged in the buying of cattle, sheep, and hogs, and converting these into fresh and cured meats for human consumption, and in the distribution and sale of the same; also, in the distribution and sale of poultry and eggs; in the manufacture, distribution, and sale of lard, butter, cheese, oleomargarine, oleo oil, cottonseed oil, animal feeds, soap, tallow, glue, and fertilizer; in the preparation, distribution, and sale of hides, sheepskins, and wool; in the tanning, distribution, and sale of leather; and in the operation of stockyards and refrigerator transportation lines. Its business extended to every part of the United States, and also to Europe, South America, and other foreign parts.

II. Compania Swift de Montevideo, S. A., was at all the times in question a corporation, created and existing under the laws of Uruguay.

III. At the close of business, December 31, 1916, the Compania Swift de Montevideo had a capital of 2,000,000 pesos, gold, divided into 20,000 shares of 100 pesos each, all owned by the plaintiff; also, a surplus of 2,072,724.03 pesos, gold, nearly all invested in plant extensions and other fixed assets required in the company's business.

IV. By proceedings duly taken in January–April, 1917, the Compania Swift de Montevideo converted into capital 2,000,000 pesos of this surplus by means of a stock dividend; i. e., that amount was transferred from the surplus account

to the capital account and 20,000 additional shares of capital stock of 100 pesos each were issued against it. The certificates representing the additional shares were delivered to the plaintiff as sole shareholder.

V. This stock dividend of 2,000,000 pesos, equal to $2,068,-000, was included as income in the plaintiff's return of net income for the taxable year 1917 on which income and war excess-profits taxes were assessed and collected. Thereafter, the Supreme Court of the United States decided that stock dividends are not income and therefore were not taxable under the acts of Congress imposing income and war excess-profits taxes.

VI. By reason of the erroneous inclusion of this stock dividend as income in the plaintiff's return of net income for the taxable year 1917 the amount of income and war excess-profits taxes assessed against it and collected from it for that year exceeded the amount lawfully owing by $498,961.29.

VII. On February 28, 1923, which was within the statutory period of limitations for filing claims for refund, the plaintiff filed a claim for refund of income and war excess-profits taxes paid for the year 1917. A copy thereof is annexed to the petition as Exhibit A and by reference is made a part hereof.

VIII. Under the said claim for refund filed by the plaintiff on February 28, 1923, the plaintiff contended before the Commissioner of Internal Revenue, amongst other things, that under § 1211 of the revenue act of 1917, as construed by the Circuit Court of Appeals for the Second Circuit in *Douglas* v. *Edwards*, 298 Fed. 229, certain dividends received by it in 1917 from various foreign corporations, including the dividend of $2,068,000 received from the Compania Swift de Montevideo, should not, as the Commissioner maintained, be included in its income for 1917, to the extent of its net earnings for that year, but that, having been specifically declared out of earnings for 1916 and prior years, and the net earnings for those years having been sufficient for the purpose, such dividends should be treated as income for those years, respectively. The decision of the Circuit Court of Appeals in *Douglas* v. *Edwards*, *supra*, was reversed by the Supreme Court on November 23,

Reporter's Statement of the Case

1925. On April 24, 1926, the plaintiff's aforesaid contention was overruled by the Commissioner of Internal Revenue. The contention that the said dividend of $2,068,000 was a stock dividend was not made before the Commissioner of Internal Revenue under said claim for refund filed February 28, 1923.

IX. On September 3, 1927, the plaintiff filed what was described as an amended claim for refund of income and war excess-profits taxes paid for the year 1917. A copy thereof is annexed to the petition as Exhibit B and by reference is made a part hereof.

X. Additional income and war excess-profits taxes to the amount of $2,813,012.05 assessed against the plaintiff for the taxable year 1917 were collected by applying as a credit against them *pro tanto* an overpayment by the plaintiff of income and war excess-profits taxes for the taxable year 1918, as hereinafter set forth.

XI. At the time this credit was allowed the procedure in the Bureau of Internal Revenue with respect to crediting or refunding overassessments of income and war excess-profits taxes was as follows:

Upon determination by the Commissioner of Internal Revenue that there had been an overassessment of such taxes for any period a certificate of overassessment was prepared addressed to the taxpayer and showing the amount of the overassessment, but it was not dated or forwarded to the taxpayer at that time. From time to time as these overassessments were determined they were listed by districts in schedules of reduction of tax liability (Form 7777, which was the form then in use), later called schedules of overassessments. Each such schedule was signed by the Commissioner of Internal Revenue and forwarded to the collector of internal revenue for the proper district with instructions reading as follows:

"The several amounts herein noted as reduction of tax liability are hereby approved and allowed.

"You will immediately check the items herein against the accounts of the several taxpayers and determine whether the several amounts in which the tax liability has been reduced should be abated in whole or in part and make such

abatement as may be warranted by the condition of the taxpayer's account for the year involved.

"If any part of the tax is found to be an overpayment, you will examine all accounts of the taxpayer for subsequent periods and apply such overpayment as a credit against the tax owing (if any) on the taxpayer's account for subsequent periods. (This applies to income, war profits and excess-profits taxes only.)

"The balance (if any) of the overpayment shall be entered in column 12 and placed upon a schedule of refunds (Form 7777A) and an appropriate memorandum made upon the taxpayer's account.

"You will thereupon complete and certify this schedule and Schedule 7777A and return three copies of each to the Commissioner of Internal Revenue at Washington, making the appropriate entries in your accounts."

(At the time here in question the schedule of refunds, Form 7777A, referred to in the last two paragraphs of these instructions, had been changed to a schedule of refunds and credits, Form 7805A.)

The certificates of overassessment addressed to the taxpayers named on the schedule were forwarded to the collector at or about the same time that the schedules of reduction of tax liability (Form 7777) were forwarded.

If in any case the collector found that no part of the overassessment had been paid, the whole thereof was abated and the certificate of overassessment was filled in accordingly and dated and mailed directly to the taxpayer by the collector.

If the collector found that all taxes previously assessed had been paid and that, therefore, the overassessment was an overpayment as well, and if he found that the taxpayer owed taxes for other periods, he entered on the schedule of overassessments under the heading, "Credit (Amount)," whatever amount, within the limits of the overpayment, the taxpayer owed, and under the heading, "Account to be Credited," a reference to the proper assessment list. A like entry was made on the schedule of refunds and credits (Form 7805A) under the heading, "Amount Credited." In addition, the collector made an appropriate entry in the accounts of the taxpayer.

The balance of the overassessment, if any, was entered by the collector on the schedule of overassessments under the heading "Net amount refundable" and on the schedule of refunds and credits under the same heading. In addition, the collector made an appropriate entry in the accounts of the taxpayer.

Thereupon, the collector returned the completed schedule of overassessments and the completed schedule of refunds and credits to the Commissioner of Internal Revenue, together with the certificates of overassessment addressed to the taxpayers named on the schedule of refunds and credits. The schedule of refunds and credits was signed by the Deputy Commissioner of Internal Revenue, and then transmitted to the Commissioner of Internal Revenue, who signed it under an inscription reading as follows: "To the Disbursing Clerk, Treasury Department: The items listed in column 4 hereof have been found to be the refundable portions of overassessments heretofore allowed, and the accrued interest, if any, listed in column 6 has been found due. Payment may, therefore, be made in the amounts shown in column 7. Date __________."

The certificates of overassessment in the cases involving credits were held in the office of the commissioner until warrants were issued by the disbursing clerk of the Treasury Department for the actual refunds of taxes appearing on the same schedule of refunds and credits returned by the collector. Thereupon, the certificates of overassessment covering refunds, and interest, if any, together with warrants for the amount thereof, and the certificates of overassessment covering credits, together with warrants for the amount of interest, if any, on said credits, were dated and returned to the collector for mailing to the taxpayers.

No other communication was given by the commissioner to the taxpayer of the allowance of a credit or refund.

XII. In accordance with the procedure set forth in Finding XI above, the Commissioner of Internal Revenue, under date of February 9, 1923, signed and forwarded to the collector of internal revenue for the first district of Illinois a schedule of reductions of tax liability (Form 7777), in which was included an overassessment of income and war

excess-profits taxes for 1918 against the plaintiff in the amount of $10,304,753.94, and at the same time forwarded to the collector undated certificates of overassessment addressed to the respective taxpayers named in said schedule and showing the amount of the overassessment against each. On July 25, 1923, the collector returned this schedule to the commissioner together with a schedule of refunds and credits (Form 7805A). With respect to the overassessment of $10,304,753.94 against the plaintiff, the collector's report showed an overpayment of $4,953,575.50 (the balance of the overassessment having been abated); that out of this overpayment the following amounts were entered as credits against taxes due for the other periods, namely, $194,095.33, $2,813,012.05, $72,866.22, $3,158.81, $1,099,790.57 and $35,624.42; and that the balance, $735,028.10, was refundable. The item of $2,813,012.05 was the amount of an additional assessment of income and war excess-profits taxes for 1917, as shown in "List, Page, and Line, 1920-6/155/5-23-B," and referred to in Finding X above. At the same time that these schedules were forwarded by the collector to the commissioner the collector returned to the commissioner the certificates of overassessment in the cases of the taxpayers named on the schedule of refunds and credits, including the plaintiff.

Thereafter, under date of September 6, 1923, the schedule of refunds and credits (Form 7805A) was signed by the commissioner, the deputy commissioner having first signed it; and under date of September 26, 1923, the certificate of overassessment addressed to the plaintiff, showing the amount of the overassessment, and the portion thereof that had been abated, the portion that had been allowed as a credit, and the portion that had been allowed as a refund, was mailed to the plaintiff, and was duly received.

XIII. Treasury Forms 7777 and 7777A, schedule of reductions of tax liability and schedule of refunds, respectively, were in use by the Bureau of Internal Revenue from February, 1922, to February, 1923. Treasury Forms 7805 and 7805A, schedule of overassessments and allowance of abatements, credits, refunds and related claims, if any, and schedule of refunds and credits, respectively, were in use by said bureau from February, 1923, to December, 1926. Treasury

Form 7920, schedule of overassessments, abatements, credits and refunds, has been in use by said bureau from December, 1926, to date. In conformity with the practice existing at the time, Forms 7777 and 7805A, and none others, were used in the present case.

XIV. Treasury instructions relative to refunds, credits, and abatements were duly issued in Treasury Decision 3260, SOC-Mimeograph, Collectors' No. 2894, Bureau Memorandum No. 175, SOC-Mimeograph, Collectors' No. 2931, and SOC-Mimeograph, Collectors' No. 2969. Treasury Decision 3260 is published in volume 23 of the Treasury Decisions relating to internal revenue, and in Internal Revenue Cumulative Bulletin No. 5, at page 243, and may be referred to therein with the same effect as if made a part hereof. Pertinent portions of the other instructions referred to are set out in Exhibits I, J, K, and L, respectively, annexed hereto, and made a part hereof.

XV. No decision has been rendered by the Commissioner of Internal Revenue on the aforesaid claim for refund filed by the plaintiff on September 3, 1927. Nor has any portion of the aforesaid payment by the plaintiff of $498,961.29 on account of income and war excess-profits taxes for the taxable year 1917 in excess of the amount properly due (Finding VI, above) been refunded or credited to the plaintiff.

XVI. If the claim for refund filed February 28, 1923, either alone or in connection with the claim filed September 3, 1927, is sufficient in law, or if the claim filed September 3, 1927, independently of and apart from the claim filed February 28, 1923, was filed within the time required by law, there is due and owing the plaintiff on account of overpayment by it of income and war excess-profits taxes for the taxable year 1917 a refund of $498,961.29, together with interest at the rate of 6 per cent per annum from the date of the overpayment, September 6, 1923, to wit, the date on which the credit of $2,813,012.05 referred to in Finding X above, became effective.

The court decided that plaintiff was entitled to recover $498,961.29, with interest from September 6, 1923.

Opinion of the Court

Moss, *Judge*, delivered the opinion of the court:

This action is for the recovery by plaintiff of an admitted overpayment of its income and war-profits taxes for the taxable year 1917 in the sum of $498,961.29, with interest from the date of such overpayment. Plaintiff included in its tax return for 1917 the value of stock dividends received amounting to $2,068,000. It filed a claim for refund on February 28, 1923, alleging as a ground for the refund that the stock dividends in question should have been allocated to other years than 1917, which claim was rejected. Thereafter the United States Supreme Court decided that the value of stock dividends did not constitute taxable income, and on September 3, 1927, plaintiff filed a second claim for refund, which it designated as an amended return, and sought the refund of said sum on the ground that said stock dividends did not constitute taxable income. The Commissioner of Internal Revenue determined that the latter claim was barred by the statute of limitations, and rejected same.

We are unable to agree with plaintiff's first contention that the second claim should be construed as an amendment to the first. As stated above, the sole ground relied upon in the first claim with reference to said stock dividends was that they should have been allocated to other years than 1917. It contained no suggestion that the value of said dividends did not constitute taxable income. *Feather River Lumber Co.* v. *United States*, decided in this court May 28, 1928 [66 C. Cls. 54]; *Jonesboro Grocer Co.* v. *United States*, decided December 3, 1928 [66 C. Cls. 320].

With reference to the second claim, it is admitted that if said claim was filed within the time required by law plaintiff should recover the sum sued for, $498,961.29; and this question, in turn, depends upon the proper determination of the question as to when a credit is *allowed* within the meaning of the statutes on the subject.

Section 252 of the revenue act of 1921, 42 Stat. 268, provided, with reference to crediting or refunding overpayments of income, war-profits, and excess-profits taxes collected under the revenue act of 1917:

"That if, upon examination of any return of income made pursuant to this act, * * * the revenue act of 1917, or the revenue act of 1918, it appears that an amount of income,

Opinion of the Court

war-profits, or excess-profits tax has been paid in excess of that properly due, then, notwithstanding the provisions of section 3228 of the Revised Statutes, the amount of the excess shall be credited against any income, war-profits or excess-profits taxes, or installment thereof, then due from the taxpayer under any other return, and any balance of such excess shall be immediately refunded to the taxpayer: *Provided*, That no such credit or refund shall be allowed or made after five years from the date when the return was due, unless before the expiration of such five years a claim therefor is filed by the taxpayer: * * *."

Section 284 (b) (1) of the revenue act of 1926, 44 Stat. 66, provided:

"No such credit or refund shall be allowed or made after three years from the time the tax was paid in the case of a tax imposed by this act, nor after four years from the time the tax was paid in the case of a tax imposed by any prior act, unless before the expiration of such period a claim therefor is filed by the taxpayer; * * *."

The payment of this tax was accomplished by the allowance of a credit against an overassessment. The claim must therefore have been filed within four years from the date on which the allowance of this credit was made. Finding XII in the agreed findings of fact sets forth the steps taken leading up to the allowance of the credit in this case.

It is the contention of the Government that the credit was *allowed* on February 9, 1923, when the Commissioner of Internal Revenue certified the overassessment to the collector. This contention seems to be based on the decision in the *Penn Smokeless Coal Co.* v. *United States*, in the District Court of the United States for the Western District of Pennsylvania, decided January 3, 1929. It will be noticed that the real controversy in that case was over the question as to when the credit was "taken." It was agreed between counsel, as shown by the briefs, that "a credit is allowed when the Commissioner approves the schedule of overassessments for transmission to the proper accounting officer for credit." That point was therefore not the subject of argument. We think counsel were in error in agreeing that such was the correct principle. At any rate, it should be noticed that the

court itself fell into an unfortunate error in its discussion of the case. It is stated:

"In *Girard Trust Company* v. *United States*, *supra*, 270 U. S. 163, the court in the opinion of Mr. Chief Justice Taft, laid down a rule as follows: '*A claim for refund or credit is allowed within the meaning of the statute when the commissioner approves the schedule in whole or in part for transmission to the proper accounting officer for credit or refund.*' * * * Applying the rule laid down in *Girard Trust Company* v. *United States* to the actual procedure in the Bureau of Internal Revenue, the credit to the plaintiff was allowed when the commissioner approved the schedule of overassessments on January 13, 1926, for transmission to the collector." (Italics ours.)

The matter quoted above was not a rule laid down by Chief Justice Taft. It was a reference by the Chief Justice to a Treasury regulation and was cited only for the purpose of expressing his emphatic disapproval of the principle embodied therein, which he did in the following language:

"We can not concur, however, in the view of the Treasury Department that the date of the allowance of the claim as intended by the statute is the date when the commissioner first decides that there has been an overassessment and sends upon a proper form his decision to the collector of internal revenue who made the collection and keeps the account with the taxpayer."

Inasmuch as the decision in the *Penn Smokeless Coal Co. case* is based, in a large measure, upon a palpably erroneous premise it must be considered as of questionable value as a precedent in the present case.

It should be observed that the Government made the same contention, on the point under discussion, in the *Girard Trust Company case*. It is true that only refunds were directly involved in the *Girard Trust Company case*, but the court seems to have placed credits and refunds on the same footing, so far as the date of allowance is concerned. In defining what constitutes an allowance of a claim for refund or credit, the court stated:

"The Commissioner of Internal Revenue is the final judge in the administrative branch of the Government to decide that an overassessment has been made and that a refund or credit should be granted, and when he has made that decision

finally, he has allowed the claim for the refund or credit of the taxes paid within the meaning of the section." (Italics ours.)

The Government in its brief presented that case on the theory that no difference existed between a credit and a claim for refund in the matter of the date of the allowance. It is stated in said brief:

"* * * and the date of the allowance of the claim, that is, the date of adjudication of his right to *credit* or *refund*, remains the date of the approval of the original schedule."

The schedule is nothing more nor less than a statement of credits as well as refunds found by the collector to be due the taxpayers named therein. The opinion in the *Girard Trust Company case*, *supra*, referring to the collector's report as to the amount which should be credited on taxes due for other years, and the amount to be refunded, states (p. 171): "that this is examined by the assistant commissioner and then is delivered to the commissioner, who *makes it effective by his approval*." (Our italics.)

The commissioner "is the final judge in the administrative branch of the Government to decide * * * that a refund or credit should be granted." No other administrative officer has such authority. The commissioner's decision that there has been an overassessment is one thing; the determination that there has been an overpayment is quite another. This can not be determined by the commissioner until he is informed by the collector what part, if any, of the overassessment had been paid, and what part, if any, had been abated. In the case of *Boston Buick Company* v. *United States*, 27 Fed. (2d) 395, the question as to when a credit is allowed was directly involved. The Government contended there, as it has done in the instant case, that, notwithstanding the decision in the *Girard Trust Company case*, *supra*, the date of the allowance of a credit is the date on which the commissioner transmits to the collector a schedule of overassessments. The court held that "in view of *Girard Trust Company* v. *United States*, *supra*, it can be taken as settled that the transmission of the schedule of overassessments does *not* constitute an allowance of either a *credit* or a *refund*." (Our italics.) The court expressed the opinion that there might be some ground for differentiating

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between a refund and a credit, and suggested that the date on which the collector enters the credit on his books might be regarded as the date of the allowance of the credit. There being no necessity in that case for a more exact determination, the court concluded the whole question by stating that "it is sufficient to decide that the credit was not allowed on March 14, 1924, when the schedule of overassessments was forwarded to the collector at Boston." The suggestion of the court to the effect that the date of the entry of the credit by the collector might be considered as the date of the *allowance* of the credit is not sound, for the particular reason that the collector has no authority to *allow* either refunds or credits, that authority being vested in the commissioner, and being judicial in nature, it can not be delegated to the collector.

We have reached the conclusion that the credit involved herein was allowed within the meaning of the statute when the commissioner signed the schedule of refunds and credits as reported by the collector, which was September 6, 1923, and within four years from the filing of the second claim for refund. Plaintiff is entitled to a judgment, and it is so adjudged and ordered.

SINNOTT, *Judge;* GREEN, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

FRANK H. SWEET, AS TRUSTEE FOR THE STOCKHOLDERS OF THE SWEET & PIPER HORSE & MULE CO., A DISSOLVED CORPORATION, v. THE UNITED STATES [1]

[No. H-53. Decided June 3, 1929]

On the Proofs

Profits tax; nominal capital.—In determining what is "nominal capital," as it is used in sec. 209, war revenue act of 1917, the ratio which invested capital bears to gross sales is not a determinative factor, and where the nature of the business is such that it can not be carried on without the constant use of capital, its use in the business is not incidental, nor can it be classified as merely nominal where its use serves a direct and necessary function in carrying on the business.

[1] Certiorari denied.

The Reporter's statement of the case:

Mr. Theodore B. Benson for the plaintiff.

Mr. George H. Foster, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. Sweet & Piper Horse & Mule Company was a Missouri corporation organized August 25, 1917, and dissolved June 2, 1924.

II. The authorized capital stock of the corporation was $50,000, of which $32,500 was subscribed and paid for at par during the period from August 25 to December 31, 1917. The original subscribers were Frank H. Sweet, who subscribed to 100 shares; James M. Piper, who subscribed to 100 shares; Judd M. Biddle, who subscribed to 25 shares; Daniel H. Robertson, who subscribed to 25 shares; George S. Stroud, who subscribed to 12½ shares; Charles D. Nicoll, who subscribed to 12½ shares. C. W. Lamer subscribed to and paid for 50 shares during the year 1917. There were no changes in holdings during the remainder of the year. The par value of the stock was $100 a share.

III. At the time of the dissolution of the corporation, June 2, 1924, Frank H. Sweet was the holder of 77½ shares, J. M. Piper was the holder of 77½ shares, Claude C. Piper was the holder of 77½ shares, D. H. Robertson was the holder of 39 shares, Virginia Robertson was the holder of 1 share, George S. Stroud was the holder of 25 shares, C. D. Nicoll was the holder of 25 shares, C. W. Lamer was the holder of 50 shares, Albert Pickens was the holder of 20 shares, and A. G. Donahue was the holder of 10 shares.

IV. At the time of the dissolution of the corporation Frank H. Sweet was president, George S. Stroud was vice president, and J. M. Piper was secretary. The same three men constituted the entire board of directors. At a meeting of the directors, held June 2, 1924, at which all stockholders were present, the following resolution was passed:

"*Resolved*, That the officers and directors of the company be, and hereby are, authorized and directed to distribute all the assets of the corporation among the stockholders

thereof, in proportion to the number of shares of capital stock held by each."

V. On or about September 15, 1924, the three officers and directors, Frank H. Sweet, George S. Stroud, and J. M. Piper, consulted with an accountant and employed him to prosecute a claim for the refund of income taxes from the United States Government.

VI. On October 17, 1924, a claim for refund was filed with the collector of internal revenue for the sixth district of Missouri at Kansas City, which said claim was signed "Sweet and Piper Horse and Mule Company, F. H. Sweet, President and Director, George S. Stroud, Director."

VII. The petition to this court was made in the name of "Frank H. Sweet, as trustee for the stockholders of the Sweet & Piper Horse & Mule Company, a dissolved corporation, claimant."

VIII. At some time during the year 1924 an informal meeting of the officers and directors of the dissolved corporation was held and at which all three were present. At this meeting George S. Stroud and J. M. Piper authorized Frank H. Sweet to act in the matter of the refund claim as he saw fit. At this time Sweet and Piper contemplated moving from Kansas City. All other matters relating to the dissolved corporation had been disposed of and closed.

IX. At the time of the filing of the petition in this court George S. Stroud was dead and J. M. Piper was residing in Parsons, Kansas.

X. James M. Piper has ratified the action of Frank H. Sweet in filing the petition in this court in a statement in the form of an affidavit attached to plaintiff's motion for leave to file a petition without authentic proof of the dissolution of the corporation and appointment of trustee, which said statement has by stipulation of counsel been admitted in evidence.

XI. No other claim for refund has ever been filed on behalf of the dissolved corporation for the year 1917 and no other suit or action has been instituted in any court.

XII. A claim for refund in the amount of $7,325.70 was filed with the collector of internal revenue for the sixth

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Missouri district on October 17, 1924. The basis of the claim is that excess-profits tax liability should be determined under section 209 of the revenue act of October 3, 1917.

XIII. The Sweet & Piper Horse & Mule Company filed its return of income and profits taxes for the taxable period from August 25 to December 31, 1917, and reported therein a tax in the amount of $7,298.67, which said sum was paid to the collector of internal revenue of the sixth Missouri district May 24, 1918. A further sum in the amount of $7,325.70 was paid as additional tax October 19, 1920. The claim for refund above referred to was filed October 17, 1924, which said claim was by the Commissioner of Internal Revenue rejected in full February 11, 1925.

XIV. The business actually engaged in by the corporation during the period from August 25 to December 31, 1917, was that of a horse and mule commission business at the stockyards in Kansas City. The consignors looked to the corporation for payment for the stock and the purchaser made payment to the corporation. In certain cases the corporation advanced to the consignors sums of money prior to the shipment of stock to the corporation.

XV. The corporation sold horses and mules for consignors at auctions or private sales and charged therefor a commission of $2 for each animal sold. The corporation paid the freight on shipments and paid the stockyards for feed, yardage, halterage, shoeing, and other incidental expenses. The corporation also insured all animals. All consignors were settled with on the basis of gross sales price less the commission, freight, yardage, and other expenses. Each consignor was charged for insurance at 5 cents an animal.

XVI. The corporation was organized to succeed a similar company which had operated a commission business under the name of Wolcott, Beers & Grant, which company went out of business in May, 1917. Frank H. Sweet had been associated with this company and the president of the stockyards company, which owned the property where the business was conducted, requested him to form a new company to engage in the horse and mule commission business.

Sweet in turn interested the other stockholders mentioned and organized the corporation.

XVII. J. M. Piper had for a number of years been engaged in the horse and mule business at Fort Scott, Kansas; J. M. Biddle had been a retail dealer buying and selling horses and mules at Kansas City stockyards; D. H. Robertson had for a number of years been engaged in the same business at the same place; George S. Stroud and Charles D. Nicoll were partners engaged in buying and selling horses and mules at the stockyards in Kansas City; C. W. Lamer was engaged in buying horses and mules and consigning them to different markets. His place of business was at Salina, Kansas.

XVIII. Duing the taxable period in question F. H. Sweet was president and had practically entire management of the business. J. M. Piper had charge of the mule business.

XIX. While the business engaged in by the corporation was conducted on property owned by the Kansas City Stockyards Company, it did not operate under the express rules of the Livestock Exchange. The stockyards company did, however, require that consignors should be paid at the close of the sale of the consignment and that purchasers at auctions or private sales should pay the commission company at the close of purchases. This was also the custom of the business as conducted in Kansas City, Chicago, St. Louis, and St. Joseph.

XX. All sales were made pursuant to this custom and none was made for credit nor on any time arrangement.

XXI. There was submitted in evidence as plaintiff's Exhibit #8 a copy of the monthly trial balances during the taxable period in question. The testimony of the witness with reference to the trial balance at December 31, 1917, begins at page 29 of the record and explains charges and credits on the books of the corporation. Among the accounts on the books is that of J. M. Biddle & Company, dealers in Kansas City, which company at December 31, 1917, owed the corporation $5,465. The corporation records disclose the purchase of 26 mules on December 31 for $5,280, and that there was brought forward from a previous state-

ment $185, totaling $5,465. On January 3, 1918, J. M. Biddle & Company paid the corporation $8,480, representing the above sum of $5,280 and a purchase made on January 2 in the amount of $3,200. Churchill and Dougherty were consignors and received advances in the amounts of $3,770 and $3,720 on December 26 and December 31, and on January 9, 1918, the consignment was disposed of and the net proceeds were remitted to the consignors in the amount of $9,596.33. Other accounts were settled in similar manner.

XXII. In addition to sales of horses and mules, made in the regular course of business, animals were sold to the United States and British Governments. In such cases horses and mules were selected by the corporation and segregated and then inspected by Government officials and accepted or rejected. On all such sales the corporation received a commission of $10 an animal. In the case of sales to the United States Government, payment was made from Washington or from Kansas City. In the case of sales to the British Government, payment was made from Montreal, Canada, in which case it required from seven to ten days to receive payment. On December 31, 1917, the United States Government owed Sweet and Piper $35,484 representing purchases made December 18, 28, and 31 in the respective amounts of $5,510, $7,600, and $22,374. On January 4 and 8, 1918, $24,654 and $10,830, respectively, were paid. On December 31, 1917, the British Government owed Sweet and Piper the sum of $27,230, representing purchases made December 27 and 28 in the respective amounts of $18,465 and $8,765, and payment was received from the British Government January 3, 1918, in the amount of $27,230.

XXIII. The custom of the business required that consignors be paid in full on the last day "of the run of the sale," but as a matter of stimulating business and of accommodating consignors, advances were at times made, but all consignors were finally settled with on the basis of gross sales price less charges. Sweet and Piper had no one soliciting business and business was obtained as the result of succeeding the prior company with which Mr. Sweet had for a number of years been associated.

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XXIV. The corporation borrowed $25,000 September 19, 1917, and an additional $25,000 September 27, 1917, which sums were repaid December 31, 1917, and February 7, 1918.

During this time the company's capital of $32,500 was actually employed in the business, and by reason of the fact that the business was conducted in the way that it was conducted it was necessary to secure additional capital, amounting to $50,000, which was borrowed. Said sum of $32,500, the company's capital, and the $50,000 borrowed money was necessary to pay the consignors immediately as soon as their stock was sold, because the company's customers paid it weekly and sometimes paid in ten days.

XXV. The corporation owned no real estate and the only personal property owned consisted of office furniture, comprising a typewriter, adding machine, safe, two roll-top desks, a few chairs, two electric fans, and "quite a number of cuspidors."

XXVI. F. H. Sweet as president and general manager and J. M. Piper as secretary and assistant manager devoted their entire time to the business and received a total salary of $4,387.10 on the basis of $5,000 a year each. Employees of the company were paid $6,050.74. The employees consisted of an office force, one auctioneer, and two salesmen.

XXVII. The business engaged in by the claimant was that of wholesale commission business. There are, however, in the return two small items of income from other sources; one from traders' profits and the other from insurance. The claimant permitted two of its employees who were salesmen to trade on their own accounts, and in return for facilities afforded them received a share of the profits. During the period in question this amounted to $1,913.91. The claimant insured animals consigned to it and paid the premiums thereon. In return a charge of 5 cents an animal was made to consignors. On December 31 there was a small balance which was reported as income. Aside from these two items, all income received was in the form of commissions.

XXVIII. Gross sales in the regular commission business amounted to $2,938,329.55 and from sales to the United States and British Governments amounted to $1,127,948.48.

XXIX. The income-tax return discloses a deduction in the amount of $725.67, representing a bad account. The debtor was P. J. Hulen, a consignor, and the amount represented an advance made to him.

The court decided that plaintiff was not entitled to recover.

SINNOTT, *Judge*, delivered the opinion of the court:

Plaintiff seeks to recover $7,325.70.

The only question presented to the court for decision is the proper classification of the Sweet & Piper Horse & Mule Company, hereafter referred to as claimant, for excess-profits tax purposes, under sections 201, 210, or 209, of the revenue act of 1917, 40 Stat. 300.

The Commissioner of Internal Revenue assessed claimant's taxes under section 201, with the benefit of section 210, in order to prevent a hardship because of the relatively high earnings and small amount of capital employed. It is claimant's contention that it had not more than a nominal capital, within the meaning of section 209, and that the excess-profits tax should be determined at the flat rate of eight per cent.

Section 209, 40 Stat. 307, is as follows:

"That in the case of a trade or business having no invested capital or not more than nominal capital there shall be levied, assessed, collected, and paid, in addition to the taxes under existing law and under this act, in lieu of the tax imposed by section two hundred and one, a tax equivalent to eight per centum of the net income of such trade or business in excess of the following deductions: In the case of a domestic corporation, $3,000, and in the case of a domestic partnership or a citizen or resident of the United States, $6,000; in the case of all other trades or business, no deduction."

Claimant was engaged in the business of selling horses and mules as a wholesale commission merchant, operating in the stockyards at Kansas City, Missouri. It maintained an establishment where the owners of stock could ship the same to claimant for sale. Claimant paid the freight on the shipments, fed the stock, provided yardage, halterage, shoeing, and other incidental expenses. The stock was then sold, generally at auction, and immediately after sale claimant

remitted to the consignors of the stock the sale price, after deducting all the expenses paid by claimant.

The claimant was incorporated August 25, 1917, with an authorized capital stock of $50,000, of which $32,500 was actually paid in. This amount of capital was, during the period, found inadequate at times, and claimant borrowed from banks sufficient money to conduct its business, aggregating $50,000. Frank H. Sweet, president of claimant company, testifying as to the use by the company of said $32,500 capital stock and $50,000 of borrowed money and why it was necessary, said:

"Well it was necessary to pay the consignors immediately as soon as their stock was sold; our customers, such as the different governments, our resident dealers, paid us weekly; sometimes as much as ten days was taken."

Plaintiff contends in his brief that the basis of classification under said section 209 is the presence or absence of invested capital as a material income-producing factor; that capital was in no material manner employed, if at all, and was in no sense necessary; that the investment was employed only four months, and the gross sales amounted to over $4,000,000; that on the basis of an investment for twelve months, gross sales would have amounted to $12,000,000, and that when compared with the volume of business engaged in, the capital invested, it was entirely insignificant, and could not possibly have been a material income-producing factor, and that while claimant in some instances made advances to consignors, these advances bore no interest.

In *C. B. Fox Company* v. *United States*, No. F-336, decided by this court December 3, 1928 [66 C. Cls. 447], it was said:

"The gross sales for the year in question amounted to more than $12,000,000, and the net income to $244,230.27. Is it a reasonable contention that because plaintiff's transactions for the year in question were out of proportion to the amount of the invested capital, $100,000, such capital should be regarded as nominal or negligible? If plaintiff's contention is sound, then an invested capital of, say, $500,000, in a business which resulted in proportionately larger gross sales and a proportionately greater net income, could likewise be treated as nominal capital."

In *Feeders' Supply Co.* v. *Commissioner of Internal Revenue*, 31 Fed. (2d) 274, the Circuit Court of Appeals, opinion by Judge Kenyon, in passing on the question whether appellant was entitled to have its profits taxes for the years 1917 and 1918 computed under section 209 of the revenue act of 1917, said:

"The invested capital, then, in this matter, including surplus, for the year ending June 30, 1917, was $14,252.55, and for the fiscal year 1918 was $44,391.98, as found by the board. These would seem to be substantial sums. But appellant insists that they are merely nominal, because gross sales of over $2,000,000 were made in each fiscal year under consideration, and that such a small investment could not have been used to any appreciable or substantial extent in bringing about the result.

"[2] The amount of business carried on by a corporation is not the test to determine whether capital is nominal or otherwise. We agree with the statement in the opinion of the board, viz: 'The ratio which invested capital bears to gross sales we do not conceive to be a proper criterion for determining whether such capital is nominal or otherwise.'

"[3] Nominal capital is that which is capital in name only; that is, not substantial. Black's Law Dictionary defines 'nominal' as follows: 'Titular; existing in name only; not real or substantial; connected with the transaction or proceeding in name only, not in interest.' Webster's New International Dictionary: 'Existing in name only; not real or actual; merely named, stated, or given, without reference to actual conditions; often with the implication that the thing named is so small, slight, or the like, in comparison to what might properly be expected, as scarcely to be entitled to the name; as, a nominal difference; a nominal price.'

"In *Hubbard-Ragsdale Co.* v. *Dean*, 15 F. (2d) 410 (District Court case), which was affirmed by the Circuit Court of Appeals of the Sixth Circuit, 15 F. (2d) 1013, the court said: 'If the nature of the business is such that it can not be carried on at all without the constant use of capital, and such use of capital plays a vital part in the successful conduct of the business, it can not be said that its use in the business is merely incidental. * * * But where the use of capital served a direct and necessary function in carrying on the business as it was in fact carried on, it was not to be classified as merely nominal.'"

Applying the test as to nominal capital laid down in the above excerpt, we can not escape the conclusion that claim-

ant's invested capital of $32,500 was not a nominal but a substantial sum, and particularly so in view of the fact that the manner of claimant's operations permitted its capital to be reused every week or ten days. Neither can we escape the conclusion that its capital was necessary to its business. Not only was its invested capital of $32,500 necessary, but claimant was compelled to borrow an additional $50,000 in order to pay consignors immediately as soon as their stock was sold. It is apparent that the use of claimant's capital "served a direct and necessary function in carrying on the business as it was in fact carried on," and that claimant is squarely within the rule quoted from *Hubbard-Ragsdale Co.* v. *Dean*, in the above excerpt from the *Feeders' Supply Co. case*.

We conclude that the Commissioner of Internal Revenue committed no error. The petition is dismissed. It is so ordered.

GREEN, *Judge*, and BOOTH, *Chief Justice*, concur.

GRAHAM, *Judge*, took no part in the decision of this case; and MOSS, *Judge*, took no part on account of illness.

SAMUEL ROESSLER, TRUSTEE IN BANKRUPTCY OF THE ROYAL KNITTING MILLS, v. THE UNITED STATES

[No. D-858. Decided June 3, 1929]

On the Proofs

Settlement contract; release.—Where in settlement of a contract, manufacture under which the Government has ordered ceased, the contractor signs a release discharging the United States from all liability except the sum agreed therein to be paid, and the agreed sum is paid and accepted, the contractor is bound thereby and can not recover a claim for alleged loss due to the refusal of the wool, top and yarn branch of the Quartermaster Department to permit the sale by the plaintiff of surplus yarn which it had bought under an agreement with the said agency that it was to be used for the contract.

The Reporter's statement of the case:

Mr. Raymond M. Hudson for the plaintiff.

Mr. William W. Scott, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff, Samuel Roessler, as trustee in bankruptcy of the Royal Knitting Mills, was duly appointed by the United States Court for the District of New Jersey on February 21, 1921. He qualified and gave bond, which was approved. The attorney for the plaintiff stated in the record that the plaintiff had filed the appointment and qualifications of the said trustee and his authority to sue. No special authority from the District Court to sue has been found on file in this court by the commissioner.

II. The said Royal Knitting Mills was a corporation created under the laws of the State of New York under the name of the Farragut Textile Manufacturing Company, it having caused its name to be changed to the Royal Knitting Mills during the year 1920. This company was at all times during its existence engaged in the manufacture of cloth.

III. On July 10, 1918, the plaintiff's company entered into a contract, No. 4475–N, with the defendant represented by H. M. Schofield, major, Q. M. R. C., by the terms of which the company agreed to furnish the defendant with 60,000 pairs of knitted puttees at $2.25 per pair to be delivered between July 22, 1918, and December 28, 1918. A bond with surety for the due performance of the contract was also entered into by the company.

IV. Prior to the date of the last-named contract, and on or about January 1, 1918, the plaintiff's company had made contracts with the Panama Knitting Mills (Contract No. 1960–N) and Rosenwasser Bros. (Inc.) (Contract No. 2492–N) by which it had agreed to furnish to the said two companies a certain amount of knitted wool cloth, which in turn these companies had contracted to finish into puttees for the defendant.

V. The plaintiff's company also entered into certain contracts for the purchase of wool yarn for use in the making of

the cloth which was to go into the puttees. The contracts of purchase stated that the yarn purchased was to be used in a particular therein designated contract, this being in accordance with the regulations of the wool, top, and yarn branch of the Quartermaster Department, which had control of purchase and sale of wool. Also the plaintiff's company was obliged to sign an agreement with the defendant that it would use the wool yarn sold to it exclusively for designated Government contracts.

VI. During the summer of 1918 the defendant suspended further performance of its contracts for puttees with Rosenwasser Bros. (Inc.) and with the Panama Knitting Mills, neither of which cancellations was occasioned by any fault of the plaintiff's company. These companies likewise canceled their contracts with the plaintiff's company. The latter not having at that time received the full amount of 30,000 pounds of yarn from S. B. & B. W. Fleisher, Inc., which it was to use in its contract No. 4475–N, applied to the proper authorities representing the defendant for leave to use on contract 4475–N the yarn which was left from the unfilled contracts with the Panama Knitting Mills and the Rosenwasser Knitting Mills. This request was granted.

VII. Thereafter, during the early part of September, 1918, the said Fleisher Company began making larger deliveries of wool yarn, and it became apparent that because of the cancellations aforesaid, the plaintiff's company would have a stock of yarn over and above its needs under the contract made with the defendant. It thereupon applied for leave to sell this surplus yarn, which, at that period, was worth from 33 to 50 per cent more than what the plaintiff's company had contracted to pay for it earlier in the year, the contract price being $2.55 per lb. The defendant, however, through its controlling agency, the wool, top, and yarn branch of the Quartermaster Department, refused plaintiff's company permission to sell the surplus yarn. The amount of this surplus yarn on hand at that time does not appear.

VIII. Following the armistice and before the time limit of the plaintiff company's contract with the defendant had

expired, the defendant ordered said company to cease its manufacture and delivery of puttees. At the time of this suspension the company had delivered 50,480 pairs of puttees. It had over 5,000 yards of finished puttee cloth, a certain amount of O. D. tape, and labels, together with over 17,000 pounds of yarn, which yarn it had either on hand or under contract for delivery by the Fleisher Company and which for the purposes of its contract with the defendant was surplus. This surplus of puttee cloth, tape, and labels was made the subject of a settlement, the defendant taking the same over and paying the plaintiff's company $19,481.02 therefor. A release was executed by the plaintiff's company under date of June 13, 1919, in the following form:

"In order to effect a settlement with the Government on contract No. 4475–N for 60,000 pairs puttees, and in view of the fact that we have not supplied ourselves with all the necessary materials to complete the said contract (as more specifically set forth in the questionnaire submitted to the clothing and equipage division), we hereby agree to accept the terms set forth in plan C outlined in a communication from the office of the Quartermaster General to the zone supply officer whereby we are to receive a flat payment of $0.10 per each item canceled, to wit, 9,320 prs. puttees amounting to $932.00 plus the following allowances for the material that we have on hand and purchased solely in connection with the performance of the above-mentioned contract:

5,126 lbs. finished puttee cloth, at $3.59 (to become Government property) amounting to	$18,402.34
35 gr. O. D. tape, at $2.85, plus $2.79 inward handling charges (to become Government property) amounting to	100.55
99% of cost price on 37,280 labels, amounting to	46.13

"altogether amounting to $19,481.02 in complete settlement of the above-mentioned contract, and in consideration of the above payment to us of the last-named amount, to wit, $19,481.02, we hereby waive all claims of whatsoever nature that we may have against the U. S. Government on contract No. 4475–N.

"FARRAGUT TEXTILE MFG. CO."

IX. This release was followed on June 19, 1919, by a so-called "cancellation agreement" which was signed by the plaintiff's company and the defendant, which was in the following form:

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Agreement entered into this eighteenth day of June, 1919, between Major W. A. Dempsey, Quartermaster Corps, United States Army (herein called "contracting officer"), acting by authority of the Director of Purchase and Storage of the Army, and under direction of the Secretary of War for and in behalf of the United States of America (herein called "United States"), party of the first part, and Farragut Textile Mfg. Company (herein called "contractor"), party of the second part:

Whereas a certain contract was entered into between the United States and the contractor No. 4475–N, dated July 10th, 1918 (herein called "original contract," which term shall also include, wherever used herein, all agreements or orders, if any, supplementary to said contract or purchase order, except this agreement); and

Whereas the furnishing and delivery of further articles or work, under said original contract, except as herein provided, would exceed the present requirements of the United States; and

Whereas it is in the public interest to terminate said original contract as herein provided; and

Whereas the contractor, pursuant to the original contract, has incurred expenses and obligations for the purpose of furnishing and delivering articles or work remaining undelivered under said original contract, and is relinquishing prospective profits on the unexecuted portion thereof;

Now, therefore, in consideration of the premises and of the mutual covenants herein contained, it is agreed between the parties hereto as follows:

1. The contractor shall furnish and deliver to the United States raw materials, partly finished articles or work, and finished articles or work procured, performed, produced, or manufactured for the purposes of said original contract, in the quantities and upon the terms and conditions set forth in Schedule A hereto annexed and hereby made a part hereof, all of which shall become or remain the property of the United States. The quantities of articles or work herein agreed to be furnished and delivered shall include all deliveries made subsequent to Nov. 30th, 1918 (here insert date contractor was requested to suspend work under the original

contract), whether such deliveries were made prior to or subsequent to the execution and delivery of this agreement. Except as herein provided, the United States shall have no right, title, or interest in, or to, any articles or work procured, performed, produced, or manufactured by the contractor for the purposes of the original contract and not heretofore delivered to the United States.

2. Except as herein provided, the contractor shall not furnish and deliver and the United States shall not accept or pay for any articles or work agreed to be furnished and delivered under said original contract.

3. Title to all property specified on said Schedule A shall vest in the United States immediately upon execution of this agreement. All such property shall, in so far as practicable, be kept by the contractor separate and apart from property belonging to the contractor and shall be properly cared for by the contractor and shall be marked by the contractor in such manner as the contracting officer may direct. The contractor shall make such disposition of said property for the account of the United States as the contracting officer may direct unless otherwise provided in Schedule A.

4. The United States shall pay to the contractor the sum of nineteen thousand four hundred eighty-one dollars and two cents ($19,481.02), upon the terms and conditions set forth in Schedule A, hereto annexed and hereby made a part hereof, which sum, together with payment for the finished articles or work delivered to the United States on or before November 30th, 1918 (here insert date contractor was requested to suspend work under the original contract), and not yet paid for, shall constitute full and final compensation for articles or work delivered, services rendered, and expenditures made under the original contract and this agreement.

5. The contractor does hereby for ______self, ______ successors, heirs, legal representatives, and assigns, remise, release, and forever discharge the United States of and from all and all manner of debts, dues, sum or sums of money, accounts, reckonings, claims, and demands whatsoever due or to become due in law or in equity, under or by reason of

or arising out of said original contract, except the sum or sums herein agreed to be paid. Upon receipt of said sum or sums the contractor shall execute and deliver to the United States such further or additional instruments of receipt or release as the United States shall demand.

6. This agreement shall not become a valid and binding obligation of the United States unless and until approval of the Board of Review of the office of the Director of Purchase and Storage or of a zone supply officer has been noted at the end of this instrument, and upon Schedule A thereof.

In witness whereof the parties hereto have executed and delivered this agreement in triplicate as of the date first hereinabove written.

Witnesses:

LOUIS RUBINSON as to W. A. DEMPSEY,
Major, Q. M. Corps, U. S. Army.
CLARA T. KULLMAN as to FARRAGUT TEXTILE MFG. Co.,
By ARTHUR FOX,
Secy.

Approved:

BOARD OF REVIEW.
By ——— ———.

CONTRACTING OFFICER'S CERTIFICATE

(To be made when the contractor is a corporation and no written evidence of authority of the officer thereof signing the contract is furnished.)

I hereby certify that I have satisfied myself of the authority of the person signing the contractor's name to this agreement to bind it in the matter, and I have waived the filing of evidence of such authority as permitted so to do by Army Regulations.

W. A. DEMPSEY,
Major, Quartermaster Corps, U. S. Army,
Contracting Officer.

ASSENT OF SURETIES

The undersigned sureties to the bond pertaining to the above-described original contract assent to the foregoing

modification thereof and hereby stipulate that said bond shall be construed to apply accordingly.

Witness our hands and seals this eighteenth day of June, 1919.

Witnesses:

------------------ as to ------------------[SEAL.]

------------------ as to ------------------[SEAL.]

THE AETNA CASUALTY & SURETY CO.,
By W. C. ARMITAGE, *Resident Vice President.*

Attest:

M. F. GILGAN,
Resident Assistant Secretary.

X. When the surplus yarn was finally released (about November 30, 1918) by the defendant for sale its value was reduced on the market to about 50¢ per pound. What was done with this yarn does not clearly appear.

XI. The plaintiff company's alleged loss because of the nonallowance of a sale of the surplus yarn, amounting as alleged to 17,285 lbs., was made a subject of a claim filed in the War Department on or about February, 1919. Several hearings were had thereon, and on June 4, 1919, the Board of Contract Adjustment of the War Department made its findings of fact and decision in which it held that relief should be given to the plaintiff's company, and directed that certificate C be executed and the claim transmitted to the Claims Board, office of the Director of Purchase, for further proceedings pursuant to the decision. After the claim was sent to the Claims Board, Director of Purchase, for action it was returned to the Board of Contract Adjustment for reconsideration by the "special member" of the War Department's Claims Board with the request that the decision be set aside and vacated. In accordance with the request the board, without assignment of reason, made its conclusion that that plaintiff's company was not entitled to relief.

XII. The evidence to support plaintiff company's claim of loss is lacking in definiteness, both as to amounts and values, and also does not make available to the commissioner the basis for the $10,933.90 claim of the Fleisher Company,

which claim the plaintiff has incorporated as its own for the purposes of the present action.

The court decided that plaintiff was not entitled to recover.

GRAHAM, *Judge*, delivered the opinion of the court:

This case was originally heard on demurrer and the demurrer was sustained. (60 C. Cls. 405.) The plaintiff thereafter filed an amended petition and the case went to hearing before a commissioner.

While no copy of the contract relied upon was filed with the petition, as required by the rules of the court, the case has been before a commissioner. Without discussing the details, the Government finally concluded to allow some sort of remuneration to the plaintiff's company under an order given to it to furnish material to another contractor who was making puttees, and after the cancellation of these orders to third parties which put an end to the company's supplying them with cloth, and after conferences, the matter was settled by a release on June 13, 1919, wherein in consideration of the plaintiff's company being paid the sum of $19,481.02 it released all claims of whatsoever nature it might have at that time against the United States Government under said alleged contract mentioned in the petition, and thereafter, on the 19th of June a formal cancellation agreement was entered into by which in consideration of the payment of the sum just mentioned, which was in payment of certain materials which were to be taken over by the defendant, the plaintiff's company released and forever discharged "the United States of and from all and all manner of debts, dues, sum or sums of money, accounts, reckonings, claims, and demands whatsoever due or to become due in law or in equity, under or by reason of or arising out of said original contract, except the sum or sums herein agreed to be paid."

Both releases were signed by the plaintiff's company and the sum agreed to be paid to the company was paid to and received by it. This would be sufficient to prevent the plaintiff from recovering. The findings, however, show that the plaintiff has failed to prove his claim either "as to amounts or values." The petition should be dismissed and it is so ordered.

SINNOTT, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

Moss, *Judge*, took no part in the decision of this case because of illness.

AMERICAN STORES COMPANY v. THE UNITED STATES

[No. F-351. Decided June 3, 1929]

On the Proofs

Sale of supplies; agency; authority of Secretary of War; partial refund of price on contract of sale; custom of trade; consideration; substitution of order.—The authority of the Secretary of War under the act of July 11, 1919, in the sale of surplus supplies, "upon such terms as may be deemed best," was more than that of a mere sales agent, and a refund to a vendee in accordance with the custom of the trade, on goods not yet resold by it, of the difference between the price previously agreed to and paid and a lower price thereafter offered to purchasers, was within the Secretary's authority, notwithstanding the absence of a benefit passing from the vendee. And where a portion of the original sale was canceled by the parties thereto and other articles exceeding in quantity and value substituted, there was a sufficient additional consideration to establish the validity of the new contract.

The Reporter's statement of the case:

Mr. Jesse C. Adkins for the plaintiff. *Mr. George W. Dalzell* was on the brief.

Mr. Assistant Attorney General Herman J. Galloway for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff, American Stores Company, is a corporation engaged in the operation of a very large number of stores for the sale of foodstuffs and provisions.

II. On May 1, 1926, plaintiff entered into a contract with the defendant to furnish and deliver a large quantity of butter for a stated price, and afterwards in pursuance of said contract delivered to the defendant the amount of butter

contracted for, and the defendant accepted the same as full and complete performance of the contract on the part of plaintiff. The total amount payable to plaintiff for the butter in accordance with the contract was $126,066.82, of which the defendant has paid all but $22,106.44, which the Comptroller General claimed was due to the defendant on certain other contracts herein referred to. Subsequently the Comptroller General demanded of the plaintiff an additional sum of $7,148.56, which the plaintiff has not paid.

III. In July, 1920, and thereafter, the War Department had on hand large quantities of surplus supplies of canned goods which had been purchased for the Army, including bacon, corned beef, and corned-beef hash, and was desirous of selling the surplus stocks as speedily as possible. Government officials duly authorized issued a circular offering for sale surplus canned meats in accordance with prices and terms fixed in said circular. A copy of this circular is attached to a stipulation filed herein by the parties. It is marked "Exhibit 2" and is made part hereof by reference.

IV. Plaintiff having received said circular, on September 21, 1920, entered into an agreement with the defendant to purchase 120,000 cans of corned-beef hash at a certain price and in accordance with certain terms, all as set forth in Sales Order E–2412 executed by plaintiff, which is attached to the stipulation of the parties filed herein and marked "Exhibit 3" and made part hereof by reference. At the same time the plaintiff purchased from defendant 30,000 cans of bacon upon prices and terms set forth in Sales Order E–2411, executed by plaintiff, marked "Exhibit 4" and attached to the stipulation filed herein, which is made part hereof by reference.

V. On November 3, 1920, the defendant by its duly authorized officials issued a circular offering for sale surplus stocks of canned meats upon prices and terms much more favorable to the purchaser than the prices and terms specified in the circular statement thereof under which plaintiff made the purchases recited in Finding IV. These prices and terms are set forth in Exhibit 5 attached to the stipulation which exhibit is made part hereof by reference thereto.

VI. On November 5, 1920, the Quartermaster General of the Army, through Lt. Col. L. E. Hanson, chief of the surplus property branch, addressed a letter to the depot quartermaster at New York City, the contents of which were communicated to the plaintiff. Said letter stated in substance that it was apparent that there would be numerous claims from purchasers of canned meats under the old prices and scale of discounts; that it was desired to allow customers the benefit of the new prices and discounts on purchases made and already delivered to the customer but which remained in the customer's warehouse undisposed of or which were in transit; that the depot quartermaster was directed to ascertain the amount of canned meats purchased from him remaining in customers' warehouses undisposed of or in transit and to adjust the prices paid with those named in the second circular of prices.

It also stated that on canned meats ordered and paid for but not shipped, adjustment with customer would be made on the basis of new prices, discounts, and terms.

VII. On November 15, 1920, the conditions of deliveries of goods and payment therefor under sales orders mentioned in Finding IV hereof were as follows:

Of the 120,000 cans of corned-beef hash covered by Sales Order E–2412, 33,600 cans had been delivered to the plaintiff and sold by it, and there remained 86,400 cans which either had not been delivered to the plaintiff or remained in the plaintiff's possession unsold and undisposed of.

The plaintiff having paid for the said 86,400 cans of corned-beef hash at the rates and discounts set forth in the circular, Exhibit 2, the War Department pursuant to the letter of November 5, 1920, refunded to the plaintiff $5,875.20 on account of the said Sales Order E–2412.

Of the 30,000 cans of bacon under Sales Order E–2411, 13,200 cans had been delivered and received by the plaintiff, but none of the said bacon had been sold or disposed of by the plaintiff. The plaintiff having paid for the said 13,200 cans of bacon at the rates and discounts set forth in the circular, Exhibit 2, the War Department, pursuant to the above-mentioned letter, gave the plaintiff credit for $3,378.89, of which amount $2,911.20 was refunded to the plaintiff in

cash. The difference between $3,378.89 and $2,911.20 was never paid to the plaintiff.

VIII. On March 8, 1921, there still remained undelivered to the plaintiff, under Sales Order E–2411, 16,800 cans of bacon. On that date the plaintiff requested the depot quartermaster at Philadelphia to permit the plaintiff to purchase, in lieu of the undelivered bacon on Sales Order E–2411, corned beef #1, and to permit the plaintiff to purchase additional corned beef in order that the plaintiff might take advantage of the lowest rate of discount specified in the circular, Exhibit 5, so that the total quantity of corned beef #1 purchased should be 360,000 cans. By letter of March 8, 1921, the depot quartermaster at Philadelphia recommended to the quartermaster supply officer at New York that the plaintiff's request for the purchase of corned beef #1 in lieu of the bacon remaining undelivered be granted, and in an endorsement upon the said letter the assistant supply officer stated that the depot authorized the exchange, but cancellation of Order E–2411 would be necessary. The contents of said letter and endorsement were communicated to the plaintiff.

The plaintiff was moved to the cancellation of its order for bacon and the purchase of a quantity of corned beef largely in excess of equivalent bacon by the high discount rate and low prices offered in the Circular Exhibit 5 and the opportunity offered in the letter of November 5, 1920, of applying the reduced prices to undistributed goods theretofore ordered.

IX. On March 21, 1921, the commanding officer of the Philadelphia General Supply Depot addressed to the quartermaster supply officer of the eastern surplus property control area at New York City a letter, which is marked "Exhibit 8" and attached to the stipulation of the parties filed herein which is made part hereof by reference. This letter referred to the transactions between plaintiff and defendant since the original purchase and gave instructions for the delivery to the plaintiff of canned meats in accordance therewith, cancelling the sale of the undelivered balance of 16,800 cans of bacon and confirming a new sale for 7,500 cases of corned beef at prices stated therein.

Reporter's Statement of the Case

X. On March 24, 1921, a letter or sales order was signed by the plaintiff and Maj. A. M. Wilson, of the office of the depot quartermaster at New York, for the purchase of 360,000 cans of corned beef. This letter was known as Sales Order E–6213. This sales order, which is attached to the stipulation of the parties and marked "Exhibit 9," is made part hereof by reference, and was on the same form as the previous sales orders and called for the purchase of 360,000 cans of corned beef #1 at 15¢ per can less 28 per cent.

XI. On March 24, 1921, a letter or sales order was signed by the plaintiff and Major A. M. Wilson, assistant eastern surplus property control officer. This sales order, which was numbered E–2411, was on the same form as the previous ones and called for the purchase of 13,200 cans of bacon #12, at the rates quoted in Exhibit 5, and bore the following notation at the head thereof:

"Correcting #2411 sale changing quantity 30,000 cans to read 4200 and 9,000 cans balance 16,800 cans canceled for the purpose of buying C. B. #1."

XII. For the 360,000 cans of corned beef #1 purchased by the plaintiff under said Sales Order E–6213 plaintiff paid the defendant at the rate and discount specified in said circular, Exhibit 5, for gross purchases in excess of $100,000.00. That is to say, the 16,800 cans of bacon remaining undelivered upon the original Sales Order E–2411 were computed (at the prices and discounts specified in said circular, Exhibit 5) as representing $30,240.00 (or $2.50 per can less 28 per cent discount), and this amount was taken to represent the purchase price of 280,000 cans of corned beef at the prices and discounts specified in the circular, Exhibit 5, to wit, 15¢ per can less 28 per cent discount, and was paid by the plaintiff to the defendant. The price of the additional 80,000 cans of corned beef under Sales Order E–6213 was computed at the same rate and discount, to wit, 15¢ per can less 28 per cent discount, as specified in said circular, Exhibit 5, or $8,640.00, and this amount was paid by plaintiff to defendant.

XIII. In applying to the undelivered and undistributed goods purchased by the plaintiff under the circular, Exhibit

2, the reduced prices and increased discounts established by the circular, Exhibit 5, the War Department was following a practice customary among wholesale dealers in commodities.

XIV. In a letter to the plaintiff dated June 8, 1926, the Comptroller General asserted a claim with reference to the 16,800 cans of bacon mentioned in Finding VIII.

By his letter to the plaintiff of October 5, 1926, the Comptroller General asserted a different claim with respect to the said bacon, as follows:

"In sale E–2411, 16,800 cans of bacon No. 12 were not called for, and under the 'cancellation' of March 23, 1921, you were illegally granted the privilege of exchanging the 16,800 cans of bacon No. 12 for a certain number of cans of corn beef No. 1 under the list price and discounts effective November 15, 1920. Under circular July 22, 1920, 16,800 cans of bacon No. 12 at $2.57 less 20 per cent discount is $34,540.80. This sale would then appear as follows:

Under circular of July 22, 1920:		
319,822 cans of corn beef No. 1 at $0.215	$68, 761. 73	
Less 20%	13, 752. 35	
		$55, 009. 38
As adjusted:		
319,822 cans of corn beef No. 1 at 15¢	47, 973. 30	
Less 28%	13, 432. 52	
		34, 540. 78
		20, 468. 60"

As previously stated, the plaintiff had been refunded $5,875.20 on account of corned-beef hash which had been sold and paid for, and had also been given credit on the bacon which had been sold plaintiff and paid for in the sum of $3,378.89, but only $2,911.20 was refunded to the plaintiff in cash. The three items of $20,468.60, $5,875.20, and $2,911.20 make up the total of $29,255, for which judgment is asked by the defendant in its counterclaim.

XV. All canned goods purchased by the plaintiff from the defendant were in carload lots.

XVI. The respective officers whose names are signed to the several exhibits herein referred to were, in so signing, acting for and on behalf of the Secretary of War.

The court decided that plaintiff was entitled to recover $22,106.44.

Opinion of the Court

GREEN, *Judge*, delivered the opinion of the court:

The material facts in this case are not at all complicated. At the close of the World War the Government had on hand an enormous quantity of surplus military supplies in the form of canned goods which had been purchased for the Army, including bacon, corned beef, and corned-beef hash, and was desirous of selling these surplus stocks as speedily as possible. It was a matter of common knowledge that the longer these supplies were kept the smaller the price which was likely to be obtained. Realizing this fact, Congress by the act of July 11, 1919, authorized the Secretary of War to sell these supplies "to any corporation or individual upon such terms as may be deemed best." Pursuant to this authority the War Department, through proper officials, issued a circular giving prices and terms upon which these canned goods would be sold, and plaintiff, which had 2,150 stores for the sale of provisions, on September 21, 1920, purchased 120,000 cans of corned-beef hash and 30,000 cans of bacon, making a total purchase amounting to $103,500.

In November of the same year the War Department, finding that these canned goods were not moving as rapidly as was desirable, issued another circular giving prices and terms thereon lower and more favorable than those of the circular first issued. Shortly after this new price list had been issued the Quartermaster General announced that "on all canned meats ordered and paid for but not shipped, adjustment with customer will be made on the basis of new prices, discounts, and terms of shipment." On November 15, 1920, of the 120,000 cans of hash purchased, 33,600 cans had been delivered to the plaintiff and sold by it and the remaining 86,400 cans the plaintiff had not received or had not disposed of. Of the 30,000 cans of bacon purchased, 13,200 had reached the plaintiff but none of it had been resold. The plaintiff having paid for the entire order of the corned-beef hash, the War Department, therefore, in accordance with the policy announced by the Quartermaster General, refunded to the plaintiff $5,875.20. Of the bacon ordered, the plaintiff having paid for 13,200 cans, the War Department gave the plaintiff credit for $3,378.89, of which amount

$2,911.20 was refunded to the plaintiff. On March 8, 1921, there still remained undelivered to the plaintiff 16,800 cans of bacon. On that date the plaintiff requested permission to purchase in lieu of the undelivered bacon an amount of corned beef exceeding the quantity and value of the bacon ordered. This proposition of plaintiff was accepted by the Government officials and the order for the bacon was canceled. The plaintiff paid for this corned beef in accordance with the agreement, and the transaction for the time being was closed.

Five years later the plaintiff sold to the defendant a large quantity of butter pursuant to a contract which it fulfilled. When, however, the matter of payment arose the Government withheld therefrom $22,106.44, which it still withholds, and has further demanded of the plaintiff an additional sum of $7,148.56, which the plaintiff has not paid. The cause of this action on the part of the Government is found in a ruling of the Comptroller General, who held that the action of the Quartermaster General and the War Department in modifying the original contracts made by the plaintiff with the defendant for the purchase of canned goods was unauthorized and void by reason of which the amount withheld and the additional sum demanded became due from the plaintiff to the defendant. The question in the case is whether this ruling was correct.

So far as the transaction is concerned whereby a portion of the order for bacon was canceled and in lieu thereof an order for an amount of corned beef exceeding in quantity and value the order for bacon, it is quite clear there was a consideration for this new contract. Plaintiff gave up its right to demand bacon from the defendant and the defendant canceled the order for bacon and accepted instead an order for corned beef larger in quantity and value. There can be no doubt but that the War Department had the authority to so act.

With reference to the refunds made to the plaintiff after the issuance of the circular of new price lists and discounts, the question is more difficult, although it must be said if it related to the power of a selling agent of a concern engaged

in the wholesale business there would not be the slightest question as to his authority to make the refunds under the same circumstances.

It becomes necessary therefore to determine what power had been granted the Secretary of War by the act of Congress.

Congress had authorized the Secretary of War to dispose of the surplus property "upon such terms as may be deemed best." This authority is very broad. We think it meant that he might dispose of this property in such a manner as he considered was for the best interest of the Government. Support will be added to this construction if we consider the action of the Secretary of War in the light of the surrounding circumstances and the emergency which had arisen.

Congress must have known that there was an enormous amount of these supplies on hand and that they must be sold with reasonable dispatch, for the longer they were kept the less would be obtained for them, but the Government had no organization properly equipped to dispose of these goods to the consumer. If disposed of, they must be sold through large selling organizations such as the plaintiff had with its over 2,100 stores. Also, we think it was apparent to Congress that the supplies must be sold in accordance with the custom of the trade in disposing of such products, and it was intended they would be so sold where such customs were in the interest of the Government. Selling agents of large wholesale concerns who are endeavoring to dispose of large quantities of goods within a comparatively brief period in case of a change in prices and discounts usually give to their customers the benefit of new prices and discounts upon unsold goods purchased under the former rates. But even if it can not be said that the court can take judicial notice of such a practice, it is quite evident that it was to the interest of the Government to follow it under the circumstances before us. The Government still had on hand great quantities of these canned goods which were not being disposed of as rapidly as was desired. No one knew what changes might be made in the Government's price list in order to bring about the sale of these goods. If those considering purchases

understood that changes might be made giving lower prices and discounts than those under which they bought, thus not only depriving them of any chance of profit but making a loss probable, it is obvious that all purchasers would hold back to the last day in order to get the lowest prices. The Government could not hope to dispose of these supplies if it discouraged future purchasers by failing to deal fairly with those who had already purchased. It was therefore clearly to the interest of the Government to make the refunds on the unsold goods which were either in the hands of the plaintiff or which had not been shipped but had been paid for. In so far as this applied to the goods that were not shipped, it was merely a cancellation of an unfulfilled contract. The findings, however, show that some of the supplies upon which refunds were made had been actually delivered to plaintiff and payment made therefor.

Neither of the original contracts, however, had been completely carried out. Was the War Department authorized to cancel these contracts and make the refunds? The question is not free from doubt, but on the whole we think it was.

Our attention has been called to the case of the *American Sales Corporation* v. *United States*, recently decided by the Circuit Court of Appeals for the fifth circuit, as an authority for holding that the defendant is not liable. The facts and circumstances of that case were quite different from those in the case at bar, and we are compelled to decline to follow the doctrine laid down therein as applicable to the questions under consideration in the instant case.

Numerous authorities can readily be found and cited which hold that where an agent is authorized to make a sale of a particular parcel of property, such as a tract of land or an article of personal property, he has no authority to revoke or rescind the sale and receive back the goods which he had previously sold or alter his contract in any material point, but, as is said in 2 C. J. 609, section 243:

"A general agent with full authority to represent the principal in a given locality, or to manage a particular branch of the principal's business, is more than a mere sales agent, and where the conduct of his agency reasonably requires power to modify the contracts he makes, courts have often held the right so to do to be within his implied powers."

We think the Secretary of War was "more than a mere sales agent." His power extended to the disposition of this great amount of property which must be sold in a great number of different parcels and lots, and we think that the circumstances of the case were such that the proper "conduct of his agency reasonably requires power to modify the contracts he makes." The Secretary of War was appointed the agent of the Government not merely to sell the goods included in the purchase made by plaintiff but all the vast quantity of surplus supplies which, to avoid deterioration, must be quickly sold. If a modification of a contract was in the interest of the Government, we think he had power to make such a modification, especially when the contract had not been entirely carried out, which was the situation in the case at bar. There are numerous cases which hold that the Secretary of War or the Secretary of the Navy may cancel contracts which he has made if such cancellation is in the interest of the Government, even though the authority conferred upon him so far as the language of the statute is concerned is only to make and execute contracts. It is true that in these cases there was something in the nature of a settlement or there was some consideration passing between the contractor and the Government, yet in most of them the controlling feature that led the court to conclude that the Secretary had power to make a new contract was that the action was in the interest of the Government and that such authority would be implied notwithstanding it was not expressly granted by the statute conferring it.

While the Government received, as we think, a benefit as a result of carrying on its business in a fair and equitable manner and making refunds which were morally although not legally due the plaintiff, the benefit was not one which passed from the plaintiff and consequently could not be considered a consideration. If the transaction of the refunds is to be sustained at all, it must be on the ground that the Secretary of War had the broad power of a general sales agent acting for a large mercantile concern not only to make contracts but to modify them in order that he might better execute in the interest of his principal the general powers which had been given him. If the Secretary of

War did not have this power, he was seriously hampered in the conduct of the public business. We think that Congress intended by the broad language of the statute conferring authority upon him to authorize the modification of contracts for the sale of these supplies when he "deemed" it "best" for the public interest.

It follows that the plaintiff is entitled to recover the full amount claimed, and judgment will be rendered accordingly.

SINNOTT, *Judge*, and BOOTH, *Chief Justice*, concur.

GRAHAM, *Judge*, took no part in the decision of this case, and MOSS, *Judge*, took no part on account of illness.

COCONUT PLANTATIONS CO. v. THE UNITED STATES

[No. D-860. Decided June 3, 1929]

On the Proofs

Dent Act; order for material; failure to sign formal contract; compliance with statute.—Where pursuant to negotiations between the plaintiff and the Government a formal contract embodying an order previously given for material is prepared and sent to the plaintiff, but not signed by the plaintiff owing to delay in obtaining the necessary bond, until the armistice intervened, claim for damages sustained by the plaintiff is under the Dent Act and the formalities required by that act must be complied with before suit.

The Reporter's statement of the case:

Mr. Raymond M. Hudson for the plaintiff.

Mr. W. F. Norris, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff is a corporation chartered under the laws of the State of Massachusetts and has its principal place of business in the city of Boston.

II. The defendant during the years of 1917 and 1918 required large quantities of castor oil for use in airplane motors.

This oil is made from the castor bean which thrives best in semitropical or tropical climates, and for this reason the defendant was not able to obtain the same sufficient for its needs within the boundaries of the United States.

III. A Mrs. C. B. O'Connor, who had had a few years' business experience in Cuba and in Mexico and who was then a real-estate operator, interested herself late in the year of 1917 in the possibilities of promoting companies and organizations for the purchase of land suitable for the planting and cultivation of the beans. To this end she made a study of the subject, both from the standpoint of production and from the standpoint of market. During the course of her study of this subject and her endeavors to promote such organizations, she interested the plaintiff in a proposal that it grow castor beans on a coconut plantation which it owned in Nicaragua, and likewise interested the defendant in considering a contract with the plaintiff for production. The result of this mutual interest was a communication dated August 28, 1918, from the manager of the plaintiff company to the proper representative of the defendant in which he stated that the company had operated a coconut plantation on the eastern coast of Nicaragua for the past year; that it had built up a strong field organization and was familiar with tropical agriculture and the handling of local labor. He went into detail as to the qualities of the various managers and foremen and stated that if a contract with the Government was procured they would secure the necessary equipment for planting and that they would be able to plow and plant the entire 10,000 acres inside of three months. He further added that it might be necessary for the company to ask for Government assistance in a financial way through the usual channels.

IV. Several conferences were then had between plaintiff's and defendant's representatives, but nothing definite in the matter of an understanding was reached.

Under date of September 7 the plaintiff wrote to the defendant that its organization was able to give quick, ex-

perienced, and intelligent action, but that it could not make another move until the details of the requirements of the department as to the contract, including the maximum amount for which the contract would be made, were furnished to it. This letter was answered by the defendant on September 10, which letter was as follows:

"1. This will acknowledge the receipt of your letter of September 7th.

"2. In accordance with same and interview with Mrs. O'Connor to-day, there is inclosed herewith a draft of the terms of the contract which this section will favorably consider. As these terms are in accord with the outline previously given to you, and which it is understood are satisfactory to you, it would appear desirable that you call at this office as soon as you can arrange it excepting Saturday.

"3. A telegraphic reply from you as to the expected date of your arrival here will be appreciated.

"4. Following the usual practice of this office in such cases, it would be desirable for you to either bring with you or have sent to this office three satisfactory letters of reference regarding your financial responsibility and character, or that of yourself and associates."

The draft of the proposed contract was as follows:

Minimum: State quantity, 170,000.

Maximum: 50% larger than the stated minimum, 255,000.

Contractor: Full name and address.

Port of shipment: A regular port of call in Nicaragua of steamers to New York or New Orleans. Beans to be grown Nicaragua.

Price: $3.00 per 46-pound bushel f. o. b. vessel at port of shipment.

Quality: Good quality, whole, sound, mature castor beans properly harvested, hulled, stored, and sacked.

Payment: Payment will be made upon receipt of properly prepared vouchers in the office of the disbursing officer at Washington upon advice of inspection and acceptance.

Inspection: Port of shipment.

Guaranty: Contractor to furnish a bond equal to 10% of the minimum amount of the contract to insure deliveries specified, $51,000.00.

Deliveries: Deliveries at port of shipment to be made in approximately equal quantities over the time specified for

deliveries, and the final delivery date not to extend beyond August 31, 1919.

Contractor agrees to furnish free storage at port of shipment, not to exceed sixty (60) days.

Contractor to give due advance notice of tenders of deliveries.

The Government reserves the right to control the contractor's production methods, and to render the contractor any reasonable assistance and advice when possible.

Free access to the fields on which the beans are being grown, which beans are to be applied against the contract, shall at all times be given to duly authorized representatives of the Government.

V. Under date of September 19 the defendant sent to the plaintiff the following order:

Order No.

WAR DEPARTMENT,
BUREAU OF AIRCRAFT PRODUCTION,
Washington, September 19, 1918.

From: Office, Director of Aircraft Production.
To: Coconut Plantations Co., Boston, Mass.
Subject: Order for castor beans.

I am directed by the Director of the Bureau of Aircraft Production to place order with you for the articles listed below.

Inspection: Goods must be ready for inspection at within days after receipt of order. When ready for inspection notify

Items accepted should be packed for shipment and furnished f. o. b.

Forward on Government bill of lading which will be sent you by the traffic section, Bureau of Aircraft Production, 119 D St., NE., Washington, D. C. See instructions on reverse side.

Immediately after shipment the consignment should be listed in detail, the original copy on Form 27 (shipper's receipt), and one carbon copy on Form 27A (shipping notice), and these lists forwarded to the traffic section, Bu-

reau of Aircraft Production, 119 D St. N.E., Washington, D. C., accompanied by memorandum copy of bill of lading.

Bill upon Forms 330A and 29 inclosed herewith, observing carefully the instructions on the reverse side of Form 330A.

Shipping instructions and marking:

Item: Not less than 170,000 bushels or more than 255,000 bushels of good-quality, whole, sound, mature castor beans, properly harvested, hulled, stored, and sacked, at $3.00 per 46-pound bushel, f. o. b. vessel at port of shipment, which port shall be a regular port of call of steamers to New York and New Orleans. Beans are to be grown in Nicaragua, Central America. Contractor shall furnish bond equal to 10% of the minimum amount of this order equal to $51,000.00.

Deliveries: Deliveries at port of shipment to be made in approximately equal quantities over the time specified for deliveries, and the final delivery date shall not exceed beyond August 31, 1919. Contractor shall furnish free storage at port of shipment, not to exceed 60 days, and shall give due advance notice of tenders of deliveries. Government reserves the right to control the contractor's production methods and to render the contractor any reasonable assistance and advice when possible. Free access to the fields on which the beans are being grown shall at all times be given duly authorized representatives of the Government.

If through an act of God or public enemy the contractor is unable to make delivery from his own plantation, he should apply any deficiency at the option of the Government from some Central American or South American country satisfactory to the Government at the price herein mentioned f. o. b. vessel at a regular shipping port in such Central or South American country.

VI. Under date of September 25 a "requisition for equipment" was issued as follows:

Requisition for equipment.

B-7187
Req. No. 12
Div. or Sec.
No. AP-0013

WAR DEPARTMENT,
OFFICE OF THE CHIEF SIGNAL OFFICER,
Washington, D. C., September 25, 1918.

The aircraft section of the Procurement Division recommends the purchase of the following: Castor oil.

Item No.	Quantity	Description (detailed)
Minimum	170,000 bus. (46 lbs. per bu.)	Good quality, whole, sound, mature castor beans, properly harvested, hulled, stored, and sacked.
Maximum	255,000 bus.	Ditto. The price is to be $3.00 per 46-pound bushel, f. o. b. vessel, port of shipment. Beans are to be grown in Nicaragua, Central America. Contractor: Coconut Plantations Co., Boston, Mass. Payment will be made upon receipt of properly prepared vouchers in the office of the disbursing officer at Washington, upon advice of inspection and acceptance. Contractor will furnish bond in the sum of $51,000 to insure the deliveries hereunder specified. Deliveries at port of shipment to be made in approximately equal quantities from the time specified for deliveries, and the final delivery date shall not extend beyond August 31, 1919. See note attached.

Estimated cost: $765,000.00.

NOTE.—Where former purchases have been made of same or similar material, give the date of purchase, name, and address of manufacturer that supplied last satisfactorily, and at what price. If a particular article is wanted, or a particular or local manufacturer is recommended, give "trade" name of article, catalog number, name, and address of manufacturer, and full information, with reason for choice.

Material to be used for (exact details): Production of castor oil.

Date needed (specific): Delivery to be completed by August 31, 1919.

Reporter's Statement of the Case

Shipping instructions (specify destination, and definite marking required on packages. Specify shipment, by express, freight, or steamship. Give maximum weights for handling and recommended routing to destination) : Deliveries to be f. o. b. vessel at port of shipment, which port shall be a regular port of call of steamers to New York and New Orleans.

Packing: (Method preferred and whether domestic or export.)

Inspection (factory or destination) : Port of shipment.

Appropriation:

Allotment:

This expenditure is believed to be reasonable and warranted by the requirements of the service.

Approved.

J. G. FLETCHER,
Per H. E. D.,
Director of Purchases.

VII. On September 26 plaintiff wrote the defendant as follows:

Maj. L. B. PRESTON,
Washington, D. C.

DEAR SIR: Confirming conversation with you to-day and with Lieutenant Grant, would say—we shall be pleased to discuss with the parties in question the subject of cooperating with them for the production of Castor Beans for use of the U. S. Government during the war, on the basis of the parties mentioned furnishing the capital and we furnishing the brains, either in connection with our present plantation organization, or as a separate unit or units.

Yours very truly,

COCONUT PLANTATIONS COMPANY,
E. H. BELL,
Treasurer, 31 State St., Boston, Mass.

Likewise on the same date the plaintiff wrote to the defendant the following letter:

WAR DEPARTMENT,
Bureau of Aircraft Production, Washington, D. C.
(Attention Lieutenant Grant).
Subject: Castor Beans.

GENTLEMEN: I beg to confirm conversation with you today to the effect that I have been instructed by the Board of Directors to sign the contract for Castor Beans, minimum 170,000 bushels, maximum 255,000 bushels, and I anticipate no particular delay in executing the necessary bonds in connection with the same.

Thanking you for your courtesy, I remain,
Yours very truly,
COCONUT PLANTATIONS COMPANY,
E. H. BELL,
Treasurer, 31 State St., Boston, Mass.

VIII. An order in practically identical terms with that of September 19, with minor changes was sent to the plaintiff under date of October 9 and was intended to take the place of the order of September 19.

IX. On October 14 defendant wired the plaintiff stating that it had received no further word as to the contract and asking for advice as to developments, stating that the matter was urgent, in response to which on the same date the plaintiff's representative went to Washington for further conference.

X. On October 17 a formal contract, embodying the order previously set forth above, was sent by the defendant to the plaintiff, and on October 19th the plaintiff assured the defendant by telegram that matters were progressing favorably.

XI. Not having heard from plaintiff the defendant on October 26 wrote stating that it was awaiting the return of the contract which had been sent for execution and that prompt attention should be given the matter.

Replying to this letter under date of October 28 the plaintiff advised that it had been talking the matter over with

its associates in New York and that the matter of getting the bonds for the contract was progressing and that the transaction would be closed on Wednesday of that week.

Under date of November 6 the defendant again wrote the plaintiff that it was awaiting the return of the executed copies of the contract and asked that it give the matter immediate attention.

XII. On November 8, it being apparent that an armistice would soon be signed, the plaintiff telegraphed the defendant asking if a declaration of peace would cause cancellation of the contract. In answer to this the defendant wired as follows:

"Re tel November eighth on account of changed conditions your contract can not now be closed. If policy is changed will wire you. Please return order and contract.
"AIRCRAFT PROCUREMENT.
"MAYER."

In answer to the telegram plaintiff on November 13 wrote as follows:

"Your telegram signed 'Aircraft Procurement, Mayer' received and holidays have interfered with reply. We are unable to return to you the order and contract just at the present time, because of the fact that there has been considerable expense incurred in connection with the same.

"We are therefore filing the same in our records temporarily together with your telegraphed advice of cancellation.

"We trust this method of handling the same will be satisfactory."

XIII. On November 18 the defendant wrote to the plaintiff advising it that it still awaited the return of the executed copies of the contract. It does not appear whether or not this was written for the purpose of indicating a change in defendant's policy, the possibility of which was suggested in its telegram of November 8.

XIV. The delay in the signing of the contract appears to have been substantially caused by the failure on the part of the plaintiff to obtain the necessary bond. While the bond had not been obtained when the news of the armistice arrived, nevertheless negotiations had gone to such an ex-

tent that it seemed to be an assured matter. Negotiations as to the bond were halted, and the contract was never signed.

Prior to June 30, 1919, the plaintiff filed its claim for damages with the Air Service Claims Board, which claim was denied.

XV. The plaintiff represents its damages in the following particulars:

Profits to be anticipated	$382, 500. 00
Estate W. D. Griscom, for services of W. D. Griscom account of work on bean contract	6, 000. 00
E. H. Bell, for services	10, 000. 00
E. P. Knapp, time and services and expenses	3, 000. 00
Coconut Plantations Company, salary and expenses of J. H. Bryan	1, 200. 00
Loss on beans purchased and planted estimated at	1, 800. 00
Hotel and traveling expenses, E. H. Bell	350. 00
Hotel and traveling expenses, W. D. Griscom	1, 100. 00
Expenses incurred in Nicaragua estimated at	8, 000. 00
Legal expenses	2, 500. 00
Claire G. MacDonald, services and cash advances for expenses claim	10, 873. 12
Claim of C. B. O'Connor, for services rendered and expenses	25, 000. 00
Total	452, 323. 12

XVI. The evidence offered to support these representations as to damages was of such a nature as to make it impossible, to reach a conclusion as to the loss, if any, sustained.

The court decided that plaintiff was not entitled to recover.

GRAHAM, *Judge*, delivered the opinion of the court:

The facts are fully set out in the findings of the court. After preliminary negotiations leading up to a contract, during which negotiations it was understood that the plaintiff would furnish a bond for $51,000 to insure deliveries on October 17, 1918, a formal contract embodying the previous negotiations and the previous order was sent to the plaintiff. The plaintiff delayed in executing the contract and furnishing the bond until the 8th of November, when the Government, it being apparent that the armistice was soon

Syllabus

to be signed, wired plaintiff declining to carry forward the contract and requesting its return. The plaintiff refused to return the contract, and it is not to be found in the findings, and a copy is not attached to its petition. The plaintiff's failure to sign the contract seems to have been due to its inability to obtain the necessary bond.

It will be seen, therefore, that this is an alleged informal contract, and being such comes under the provisions of the Dent Act, 40 Stat. 1272. That act requires, before this court has jurisdiction, that the claim should be submitted to the Secretary of War, and if the claim is refused, the right of appeal is given to this court. It does not appear that this claim was ever presented to the Secretary of War, and therefore this court has no jurisdiction. *United States Bedding Co.* v. *United States*, 55 C. Cls. 459; *Baum, Trustee*, v. *United States*, 64 C. Cls. 323. But more than this, the findings show that there has been no satisfactory proof of the damages alleged by the plaintiff.

The plaintiff can not recover. The petition should be dismissed, and it is so ordered.

SINNOTT, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur in the result.

MOSS, *Judge*, took no part in the decision of this case on account of illness.

M. GRACE MURPHY, ADMINISTRATRIX OF THE ESTATE OF JOHN H. MURPHY, DECEASED, v. THE UNITED STATES

[No. D-921. Decided June 3, 1929]

On the Proofs

Contract for services; executed contract; agency; brokerage.—Where the Government sells its property under its own initiative, by its own officers, in accord with its own terms and conditions exclusively, and the services of an agent are not the proximate cause of the sale, the agent is not entitled to commission for brokerage.

The Reporter's statement of the case:

Mr. Hugh W. Ogden for the plaintiff. *Messrs. Edward O. Proctor* and *Q. I. Abrams* were on the briefs.

Messrs. Dwight E. Rorer and *Dan M. Jackson*, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Madam Loyola M. Coyne* was on the brief.

The court made special findings of fact, as follows:

I. The United States was in September, 1921, the owner of 7,554 cars, surplus railway material, built for military use in France during the Great War, useless for domestic military purposes, and to be sold as surplus war supplies.

II. By the act of Congress of June 5, 1920, 41 Stat. 948, 949, U. S. Compiled Statutes, section 6941, the Secretary of War was authorized to sell, upon terms as he might deem expedient, any material owned by the United States of the character referred to in the preceding finding to any state or foreign government with which the United States was at peace at the time of the passage of the aforesaid act.

III. These cars had been the subject matter of two previous contracts of conditional sale to the U. S. A. International Corporation. The contracts expired August 1, 1921, for failure of payment of the installment of the purchase price as required under the terms, and due notice was thereafter given of the cancellation of the contracts and the forfeiture, as liquidated damages, of the sum of $201,318.00, constituting the initial payment received by the Government.

IV. Prior to August 1, 1921, Mr. Weeks, the Secretary of War, extended the time limit in contract #66 for the sale of 7,025 cars by a supplemental agreement dated March 25, 1921, and a new contract, No. 72, for the sale of 529 cars was made. No additional installments or other payments were required.

Contract No. 66, as extended, provided for the sale of—

(1) 1,850 low-side gondolas at the unit price of $850,

(2) 75 Guerite box cars at the unit price of $1,350,

(3) 1,525 high-side gondolas with tarpaulin frames at the unit price of $950,

(4) 3,575 high-side gondolas, plain, at the unit price of $900,

making a total of $6,000,340.00, and requiring payment of an installment of $443,800.00 on or before August 1, 1921.

Contract No. 72 provided for the sale of 529 flat cars at the unit price of $700.00, making a total of $370,600.00, and requiring the payment of an installment of $25,942.00 on or before August 1, 1921.

V. Following the extension of the contracts, as stated above, Mr. Murphy sailed from New York City about June 15th to Servia and Bulgaria, and negotiations were begun for the sale of cars to those Governments and were continued through the greater part of July. Some progress was made, but due to the approach of August 1st and the requirement of payment of an installment of $569,742.00 under the contracts Mr. Murphy returned to the United States to secure an extension of time. Before leaving Sofia he was informed by the Bulgarian minister of railroads that the ministry had decided the previous night to purchase 1,000 cars, but the terms of purchase were not discussed in detail.

VI. Mr. Murphy reached Washington August 7th and endeavored to secure a further extension of the terms of the contract. He was informed that the contracts had expired under their terms for nonpayment of the installment due, and that in the absence of the Secretary of War nothing could be done in the matter. However, he was requested by Mr. Wainwright, the Assistant Secretary of War, to submit a report of the facts relative to his negotiations with the Bulgarian Government, which he did in a letter dated August 15, 1921, plaintiff's Exhibit No. 3 (Tague), which by reference is made a part of this finding.

Mr. Wainwright, at a subsequent interview, stated that he was interested in a possible sale of cars to the Bulgarian Government and intended to recommend that a new contract be made with the corporation if the terms of sale could be arranged with the Bulgarian Government.

On or about September 12, 1921, Mr. Murphy, accompanied by Congressman Tague, conferred with the Secretary of War, and told him of the Bulgarian negotiation;

that he had previously called upon Mr. Wainwright, the Assistant Secretary of War; had been informed that the contracts had expired and that nothing could be done except by the Secretary after his return. The Secretary stated in reply that he had been informed of the foregoing and added that nothing could be done at that time, or for a period of 30 days, inasmuch as he, the Secretary of War, had granted to another person a 30-day option covering France for the sale of all of the said cars. Mr. Murphy was requested to return at the expiration of that period for a further interview in regard to the matter.

VII. Shortly thereafter Mr. Murphy, while in New York, learned that the cars in question were being offered very generally in the open market. He was approached by an official of the General Equipment Company with an offer to sell the cars on behalf of the Government at the price of $1,200 per car and had suggested that Mr. Murphy undertake to negotiate a sale to the Government of Poland. He returned to Washington. He had previously been in Poland, was acquainted with some of the Polish Government officials, and informed of the financial and economic status of Poland. He was aware that the recent acquisition of upper Silesia under the plebiscite might induce Poland to buy additional cars.

Accompanied by Congressman Tague, Mr. Murphy saw the Secretary of War, told him of the foregoing, explained fully all of the facts indicative of the requirements of Poland, its reliability and capacity to pay, and reminded him that Poland had already purchased a large number of similar cars from this Government, and added that he believed that an arrangement could be made with Poland so that they would be in a position to finance the purchase of the cars in question and stated that he "would like the privilege of going over to try to sell the cars for you," meaning the Secretary of War.

The Secretary stated that he would discuss the condition of Polish finances with the State and Treasury Departments so that he would be in a position to know of its finan-

cial standing, but added that he could do nothing at that time as he considered that he was precluded by the option. He requested Mr. Murphy to return later.

VIII. Some time after August 1, 1921, and prior to October 15, 1921, Mr. Murphy notified the principal officers of the U. S. A. International Corporation that he would act thereafter on his own account in an effort to sell the cars, stating, however, that having initiated the Bulgarian negotiations in behalf of the corporation, he intended, if possible, to complete the sale for the benefit of the corporation.

IX. On October 15, 1921, Mr. Murphy, accompanied by Congressman Tague, of Massachusetts, again conferred with the Secretary of War. The question of the sale of the cars to Poland was again discussed. The Secretary of War stated that the option he had theretofore granted had lapsed and that he was anxious to sell the cars because of their rapid depreciation in value, and made some inquiries as to the Polish railway system. The Secretary said to Mr. Murphy, "When could you sail, John?" Mr. Murphy said, "I can sail on the next boat." The Secretary then said, "I will tell you what to do. You go ahead and submit to me the best proposition you can get for these cars." Congressman Tague testified that the Secretary said, "Well, John, I believe from what you say that you believe you can sell these cars, and I am going to ask you to sail to Europe and try to sell these cars and send me the best offer you can get for them." Something was said by Mr. Murphy as to "intriguing going on," and the Secretary responded, "John, go ahead; remember, I am the court of last resort; you have nothing to worry for. We want to sell these cars." Mr. Murphy and the Congressman departed, Mr. Murphy saying to the Secretary, "I will sell the cars."

X. Mr. Murphy sailed from New York City October 19, 1921; went to Sofia and endeavored to consummate the sale previously negotiated. However, due to unsettled political affairs and other difficulties which had arisen in the meantime, all efforts to sell any of the cars to the Bulgarian Government were abandoned. He left Sofia for Warsaw, where

he conferred with Mr. Julian Eberhardt, the undersecretary of state for railways, and started negotiations for the sale of the cars.

XI. At the first interview Mr. Murphy outlined to Mr. Eberhardt the proposition of the sale of all of the cars in question and stated that he was acting as agent of Secretary of War Weeks, and that he was authorized to act for the United States Government, which he was not.

Mr. Eberhardt stated that the Polish Government was in need of many cars; that it had previously purchased 4,600 similar cars from the American Government at prices ranging from $1,600 to $1,800 per car upon a payment basis of five years' credit, but that the difficulty in the way of buying at this time was lack of cash. Mr. Murphy stated that he could arrange for a sale on credit. Mr. Eberhardt then stated that he was interested, and added that the finance minister was vested with extraordinary powers and that no purchase could be made without his approval.

The discussion then turned to the question of sales price, Mr. Eberhardt offering approximately $700 per car, Mr. Murphy suggesting $850 per car, and compared this price, the size and equipment of the car, with the prices quoted by other agencies for the sale of less acceptable cars.

Mr. Eberhardt then inquired whether, if the purchase were made at the price of $850 per car, the obligation of Poland could be merged into the obligation already due upon the purchase previously made and referred to above, or whether a ten-year credit could be extended to Poland. Mr. Murphy stated that he could not give a definite answer, but added that, if the entire consignment were contracted for, and a small cash payment made, it was possible that such an arrangement might be acceptable to the Secretary of War, Mr. Weeks.

XII. Mr. Murphy was later informed that the terms of the sale had been approved in principle. He therefore dispatched the following cable message dated January 26, 1922, through the office of Henry Bancroft Smith, the American trade commissioner in Warsaw:

"buforcom washington:

"Thirty for secwar from murphyquote bulgaria serbia doubtful too many changes required hollis still negotiating stop careful study all countries convinces me poland only market for surplus cars reasons first fortysix hundred already here operating satisfactorily second prejudice against large fouraxle cars exists elsewhere third cars dont entirely conform european standards therefor circulation limited to country purchasing not suitable small countries fourth baldwin locomotives sold poland equipped westinghouse brakes fifth competitive prices european manufacturers cars suitable similar service seven hundred dollars erected and delivered stop with firm offer think could arrange sale entire lot eight hundred fifty dollars car fas following terms first ten years credit secured polish government bonds maturing nineteen thirty-two second extension loan covering former car purchase to limits present proposed contract third beginning january nineteen twentyseven principal both loans to be liquidated by six equal yearly payments amounting approximately two and half million dollars year fourth interest both loans rate be agreed upon payable semi annually starting six months after cars delivered stop if you agree in principle cable with instructions regarding details stop think this proposal worthy serious consideration end quote smith."

He then reported his action to Mr. Eberhardt. Having waited several days without receiving a reply, Mr. Murphy dispatched a second cable dated February 13th, addressed to the Secretary of War as follows:

"Can negotiate entire number cars as outlined in cable to you January twenty-sixth stop Polish Government question my authority to negotiate must get authority from you to satisfy ministry please reply American Legation."

Under date of February 23, 1922, Major E. E. Farman the American military attaché at Warsaw, advised Mr Murphy as follows:

"MY DEAR MR. MURPHY:

"I am in receipt of a cable for you signed by the Secretary of War, Mr. Weeks. This cable, dated February 18, is with reference to a sale of railway cars to the Polish Government. It is so badly garbled that we can not make out its contents and have asked for a repeat."

Reporter's Statement of the Case

Under date of February 23, 1922, the repeat message was received by Mr. Murphy and was as follows:

[Decoded by E. E. Farman]

"From: Washington.
"Date: Feb. 18, 1922.
"Number: 9/18.
"Date received: February 23, 1922 (repeated).
"9/22, Feb. 18, Washington, 63/21 19, via Western Union.
"Nine eighteen. Following for Murphy: Since the entire number of cars is unobligated, we are glad to receive offers from Polish Government through you or others. We can not authorize you to represent the United States. WEEKS."

During the interval noted above Mr. Murphy was advised by Mr. Eberhardt, by letter dated February 15, 1922, that the purchase of 7,500 cars was being considered by the minister of railways, but that the Polish Government was likely to decide on negotiating directly with the Government of the United States regarding the sale. The original letter of February 15, 1922, and the translation, plaintiff's Exhibits 7 and 7-A, Murphy, are by reference made a part of this finding.

The cable message of January 26, 1922, from Mr. Murphy to the Secretary of War was promptly delivered to the Department of Commerce, but was not transmitted to the War Department until approximately February 18, 1922.

XIII. Mr. Murphy thereafter left Warsaw and returned to Washington. He reached Washington about March 23, 1922, and, accompanied by Congressman Tague, called upon the Secretary of War. He stated that he had just returned from Poland; that the Polish Government was negotiating for the purchase of the entire 7,554 cars; and that he was rather disappointed at the cable he had received from the War Department. The Secretary stated that he had talked the sale over with Assistant Secretary of War Wainwright and asked that he confer with the Assistant Secretary, and that the latter would take the matter up and see what kind of an arrangement could be made. In the conference with the Assistant Secretary there were present Congressman Tague, the Judge Advocate General, Col. Hull, and Major Glen E. Edgerton.

Mr. Wainwright stated that he was familiar with the facts from his reading of the cables from Warsaw; that he had talked the matter over with the Secretary of War, and stated that they were agreed that Mr. Murphy "had arranged" or "was responsible for the sale of the cars to Poland." He added that Mr. Murphy was like a real-estate broker who had procured a purchaser and who was entitled to a commission if the contract of purchase and sale was consummated.

The Judge Advocate General expressed the opinion that "no brokerage commission could be paid." He was requested, however, by the Assistant Secretary to look up the law as to whether the Government could pay a commission or brokerage fee, adding that if it were found that no commission could be paid it was intended to give Mr. Murphy a contract in his individual capacity covering the cars so that he could complete the transaction with Poland.

Maj. Edgerton, in the course of the interview, stated that on January 26th, at 4.00 p. m., he had talked "with somebody" representing the Polish Government in regard to the sale of the cars; he had not, however, previously reported the fact either to the Secretary of War or to the Assistant Secretary of War. Mr. Murphy stated that he ascertained that his cablegram had arrived about ten o'clock on the morning of January 26th; that there was a difference of six or seven hours between Washington and Warsaw; and that he had verified the fact that his cablegram of January 26th had arrived in Washington about ten o'clock in the morning of that day.

XIV. Mr. Murphy was then requested to go to the office of the Judge Advocate General for a further conference. A stenographer was present and stenographic notes were made of the interview. At its conclusion Mr. Murphy suggested that he prepare and send to the Judge Advocate General a typewritten statement of all of his activities, which was acquiesced in. The stenographic statement was prepared by Mr. Murphy and delivered by Congressman Tague to the Secretary of War, who read it, remarked that it was a fair statement, and advised Congressman Tague that he

had turned all of the papers over to Assistant Secretary Wainwright.

Mr. Murphy thereafter had several interviews with Assistant Secretary Wainwright, in the course of which consideration was given by the Assistant Secretary of War to the status of the plaintiff, remarking "We have been thinking over the advisability of allowing Mr. Murphy the contract, the new contract, for the sale of the cars, personally. And with that in mind I am asking Mr. Murphy whether or not he could put up a bond for the sale of cars—if he could carry it personally." The Assistant Secretary further said to Mr. Murphy, "In the event of the Government giving you a contract on the sale of these cars, how much money could you put up as a bond? Would you put up the equivalent of the amount that was put up by the old company?" Mr. Murphy said, "No." The Assistant Secretary asked him how much he could put up and Mr. Murphy replied, "Perhaps thirty or forty thousand dollars." Mr. Wainwright added, "Perhaps this would be the way of getting over the entire situation."

The Assistant Secretary, however, advised Mr. Murphy that the question would require some time for him to reach a decision, and suggested that Mr. Murphy should return to his home in Boston and that he would be advised in due course of his conclusion. No further action in this regard appears to have been taken.

During the same interval Congressman Tague, in the course of interviews had with the Secretary of War, was informed by the Secretary that he would be governed entirely by the conclusion of the Judge Advocate General of the War Department.

XV. Subsequent to the dispatching of the plaintiff's cable message of January 26, 1922, and his cable of February 13, 1922, but prior to the dispatching of the War Department reply of February 18, noted above, the Assistant Secretary of War, Mr. Wainwright, in a memorandum to the Secretary of War dated February 17, annexed a copy of the cable reply of February 13, which had been sent to Mr. Murphy, and the proposed letter for the signature of the Secretary addressed to the U. S. A. International Corporation at 729

Seventh Avenue, New York City, in which it was stated "that sales contracts No. 66 and No. 72 expired on August first, 1921, in accordance with the provisions of the supplemental agreements thereto." This letter appears to have been in reply to the letter of the corporation dated January 31, 1921, with relation to the previous negotiations had by the corporation with the Government of Latvia.

A similar communication dated February 11, 1922, and signed by Major C. L. Sturdevant, chief of the supply section, Engineers, had previously been sent to the U. S. A. International Corporation directed to the same address, stating that in accordance with the terms of the supplemental agreement to contract No. 66, and the terms of contract No. 72, the corporation had failed to comply with the provisions of the original contracts, and that therefore the sums theretofore paid on account of the contracts had been placed to the credit of the United States as liquidated damages.

XVI. The existence of the surplus American cars was known in Warsaw prior to the appearance of Mr. Murphy in January, 1922, and inquiries had been made at the War Department by the Polish Legation "through several individuals," but no agreement had been reached and no discussion had been had between representatives of Poland and this Government upon the question of price and conditions of sale and credit, or the cost of transportation and credit for the same, or the cost of setting up of the cars after delivery, etc.

On March 18, 1922, Mr. Eberhardt informed Mr. H. B. Smith, the American trade commissioner at Warsaw, that he had secured the consent of the Polish finance minister for the purchase of the said cars on terms which were substantially those outlined at the end of the cable of January 26th, above.

Approximately ten days later cable instructions were sent by the Polish authorities to the legation in Washington relative to the submitting of bids to the War Department, and negotiations were thereafter begun and consideration given by the representatives of both Governments to the proposals and counterproposals as to unit price and provisions for credit, etc. The demands of the Polish Govern-

ment on the latter seemed to be acquiesced in by the War Department. The commercial counselor of the Polish Legation, however, became convinced that no concession could be secured upon the demands of the Polish Government relative to the unit price of $800.00 per car as required by the War Department; in the course of his correspondence with the officials in Warsaw he advised that unless he received instructions to the contrary on or before a designated date he would buy the cars at the unit price of $800.00.

At the same time written authority had been sent to him from Warsaw to purchase at $750.00. The letters crossed. The officials in Warsaw assumed that the commercial attaché would act as stated by him and that the contract of purchase would in due course be made. The commercial attaché upon receipt of the instructions to buy at the unit price of $750.00 erroneously regarded himself as restrained from paying more than that sum. The negotiations under these circumstances lagged. The War Department in due course assumed that the Polish officials had lost interest in the matter. The credit concession previously made was withdrawn, the sale was not made, and proceedings begun by the War Department for the disposal of the cars by advertisement and award upon bids received.

XVII. Under date of June 11, 1922, advertisement was begun for the sale by sealed bids to be opened July 6, 1922. The Government of Poland, being one of 10 other bidders, through its commercial counselor at the legation at Washington, submitted two bids. Its alternative bid No. 1 of proposal No. 1 for the payment of $1,208,640.00 in cash and $3,625,920.00 in six-year five per cent Government notes was accepted by the War Department officials. Certain items of this bid did not conform with the stipulations of the War Department requirements. These, however, were waived by Major Edgerton, who signed the contract of sale.

The final transaction was concluded with the official approval of Mr. Eberhardt and practically under his direction and supervision, in that the Polish minister of railways accepted his decision in the matter.

XVIII. The matter of Mr. Murphy's claim for compensation for selling the cars was referred to the Judge Advo-

Opinion of the Court

cate General of the Army, and memorandum opinions prepared by him.

Subsequent to the rendition of said opinions the Secretary of War dispatched the following communication to Congressman Tague:

FEBRUARY 14, 1923

Honorable PETER F. TAGUE,
House of Representatives, Washington, D. C.

DEAR PETER: I have carefully investigated the matter of paying John Murphy a commission on account of the sale of the cars to Poland, and am told that, under the law, there is no possiblity that any payment can be made to him. I do not see what the department can do in the case without congressional legislation, which, you will agree, will be exceedingly difficult to obtain.

Sincerely yours,

JOHN W. WEEKS.

The memorandum opinions of the Judge Advocate General's office in reference to Mr. Murphy's claim for compensation are made a part of this finding by reference.

XIX. The evidence establishes the fact that a reasonable brokerage commission for the sale of the cars above mentioned would be 5% of the amount for which they were sold.

The court decided that plaintiff was not entitled to recover.

BOOTH, *Chief Justice*, delivered the opinion of the court:

The plaintiff, as administratrix of the estate of John H. Murphy, deceased, contends for a judgment of $731,281.85, a sum alleged to be due plaintiff's decedent as a commission for supplying a purchaser for 7,554 freight cars, sold by the War Department to the Polish Government as surplus war property.

The act of June 5, 1920 (41 Stat. 948, 949), so far as applicable here, authorized the sale. It is as follows:

"That the Secretary of War be, and he is hereby, authorized, in his discretion, to sell to any state or foreign government, with which the United States is at peace at the time of the passage of this act, upon such terms as he may deem expedient, any material, supplies, or equipment, pertaining to the Military Establishment, * * * which are not

needed for military purposes, and for which there is no adequate domestic market: *Provided further*, That none of the funds appropriated or made available under this act shall be used for the payment of any salary in excess of $12,000.00 per annum to any civilian employee in the War Department."

John H. Murphy first became interested in the sale of 7,554 freight cars, belonging to and of no use to the Government, after the war, through a Delaware corporation known as the U. S. A. International Corporation. Murphy was a stockholder in and directing head of salesmen employed by the corporation. Three conditional sales contracts had been entered into between the United States and the above corporation for the disposal of all of the cars, only two of which are of importance in the case. The two here in anywise involved contained stipulations which limited the performance of the contracts to August 1, 1921, and provided a forfeiture of all down payments in the event of failure to perform within the time limit. Murphy went abroad in an endeavor to sell the cars for the corporation. He visited, among other countries, Servia and Bulgaria, and did succeed in interesting the latter country in the purchase of at least 1,000 of the cars. Negotiations however failed to culminate, and Murphy, apprehending the near approach of August 1, 1921, when the corporation's contract would expire, returned to the United States with the hope of securing an extension of time in which to sell the cars. The corporation's contract was a fixed-price conditional sale, whatever profits to accrue to the corporation being dependent upon a sale at an advanced price over the contract price.

Murphy did not succeed in securing an extension of time, and the War Department exercised the right of forfeiture by placing the down payments of $201,318.00 in the Treasury to the credit of the United States.

At this point there exists some conflict in the record. Murphy frankly states in his testimony that, having initiated the Bulgarian negotiations in behalf of the corporation, he was still deeply interested in completing the same, and if successful intended to complete the sale for the sole benefit of the corporation. At the same time he states that inas-

much as the corporation's contracts had been terminated he was intent on terminating his relationship with the corporation and act thereafter upon his own account.

It appears of record that subsequent to August 1, 1921, the Secretary of War had given to another a thirty-day option to sell the cars, and this stood in the way of immediate conferences with Murphy respecting either an extension of the time limit in the corporation's contract from August 1, 1921, on, or an independent contract with Murphy to sell the cars. During the existence of the thirty-day option Murphy while in New York City had learned from the General Equipment Company, through an offer made to him on behalf of the company, that a possible sale of the cars to Poland at $1,200 per car might be accomplished. Murphy had been in Poland and was familiar with local conditions and Poland's need for the cars. On October 15 or 16, 1921, Murphy, accompanied by Congressman Tague, of Massachusetts, conferred with Secretary of War Weeks. This interview is of signal importance, for from it the plaintiff deduces a contract to sell, or rather a contract of employment as a broker to procure a customer. In the course of this interview Murphy disclosed Poland's requirements and financial status to the Secretary, and reminded the Secretary that Poland had previously purchased from the United States 4,600 cars of precisely this same design and type. Murphy further stated that he would like the privilege of going to Poland and selling the cars "for you," believing that he could do so. The Secretary is said to have responded as follows, "When could you sail, John?" John said, "I can sail on the next boat"; in answer to which the Secretary said, "I will tell you what to do; you go ahead and submit to me the best proposition you can get for these cars." Congressman Tague testifies that the interview was in the following language: "Well, John, I believe from what you say that you believe you can sell these cars, and I am going to ask you to sail to Europe and try to sell these cars and send me the best offer you can get for them." Something was said as to "intriguing going on," to which the Secretary is said to have replied, "John, go ahead; remember I am the court of last resort; you have nothing to worry for.

We want to sell these cars." Murphy then bade the Secretary goodbye, using as his departing words, "I will sell the cars."

Murphy sailed from New York October 19, 1921, went direct to Sofia, and attempted to close a deal with Bulgaria; failing in this he proceeded to Warsaw, and soon after his arrival entered into a conference with Mr. Julian Eberhardt, the undersecretary of state for railways. Eberhardt was interested, and negotiations proceeded up to a point where Murphy's authority to represent the United States became important. The minister of finance was the authoritative official. With him Murphy had no contact. Eberhardt was the spokesman, and through him Murphy was asked for evidence of his authority to represent the United States and was also told that Poland might deal directly with the United States. Murphy cabled the War Department for authority to act. The final response to his cablegram was as follows:

"Following for Murphy: Since the entire number of cars is unobligated we are glad to receive offers from Polish Government through you or others. We can not authorize you to represent the United States. Signed Weeks."

Murphy thereafter returned to the United States. In repeated conferences with officials of the War Department he pressed his claim for compensation, all without success, the department uniformly holding through the Judge Advocate General that under the law no authority obtained to pay him, and in so far as the events of this transaction in its entirety are concerned, Poland, following somewhat extended international negotiations respecting the purchase of the cars, did not consummate a sale, the United States withdrawing its credit concessions previously made and terminating the negotiations. Subsequently, on July 6, 1922, the entire lot of cars was offered for sale by public advertisement. Poland, through the legation in Washington, submitted, along with others, a bid for the cars, and being the highest bidder its bid was accepted and the cars transferred for a sum of $1,208,640.00 in cash and $3,625,920.00 to be paid within a period of six years.

Opinion of the Court

The plaintiff claims a commission of fifteen per centum of the purchase price of the cars, and the expense incurred in the alleged sale of the same.

In the case of the *Erie Coal & Coke Corp.* v. *United States*, 266 U. S. 518, 521, the Supreme Court held that an act authorizing the sale of surplus war supplies is not inconsistent with section 3744, Revised Statutes, and the same is applicable to such sales. The plaintiff asserts the inapplicability of section 3744, requiring contracts with the War Department to be in writing, upon the theory that the suit is not for a breach of an executory or special contract, but a claim essentially predicated upon services rendered by a broker in procuring a purchaser for the cars. In other words, it is insisted that where a broker finds a customer for his principal, in response to an employment so to do, he has earned his commission, and in the absence of an agreement for fixed compensation is entitled to recover upon the basis of *quantum meruit*. If we correctly apprehend the contention, it is reduced to the simple proposition that Murphy did procure a customer for the cars under an agreement so to do, and the contract having been executed and the United States having received the full benefits thereof, nothing remains except to compensate the plaintiff upon the basis of *quantum meruit*, notwithstanding the nonexistence of a written contract, as provided in section 3744. *Clark* v. *United States*, 95 U. S. 539; *St. Louis Hay & Grain Co.* v. *United States*, 191 U. S. 159.

The record indisputably discloses that whatever contract of employment existed between Murphy and Secretary Weeks is to be deduced from the conversation passing between them; i. e., conceding the force of plaintiff's contentions that where a broker secures a purchaser in accord with an employment so to do he is entitled to be paid. Obviously the difficulty of sustaining the making of a contract wherein oral conversations, decidedly indefinite and uncertain, lies in the fact of ascertaining what was meant, what was intended, and what were the terms and conditions of the undertaking. In this case we have a contemplated sale of personal property of a value in excess of five millions of dollars, property which cost the United States a much larger

sum, and which purchasers, brokers, or others knew would be sold at a bargain. A sale of such magnitude undoubtedly attracts the possibility of profits in the purchase thereof at a bargain and its resale to others. This we have positively and expressly illustrated in the conditional sale of these cars to the U. S. A. International Corporation. Murphy was familiar with the entire situation with respect to a market for these cars, both at home and abroad. It seems hardly possible that he would have assented to an oral contract involving compensation of a great amount upon mere oral statements of the Secretary of War. The War Department and its Secretary were assiduously engaged in commercial transactions of extreme importance and magnitude, involving almost every conceivable variety of merchandise. The Secretary knew the limits of his authority and the mode and manner of selling surplus war materials; it is almost inconceivable that it would escape his attention to place in writing a contract of employment to sell merchandise for the department when he must have known that the commission to be paid would mount into hundreds of thousands of dollars. On the other hand, Murphy was an experienced and trained salesman. That had been and continued to be his chosen vocation throughout his life; assuredly it seems improbable that he would have undertaken this enterprise upon the basis of an oral contract without the mention of terms of sale, the purchase price to be asked, the commission he would be paid, and the innumerable details that enter into the consummation of a transaction of this great magnitude. We say all this as not conclusive of the nonexistence of a contract but available to ascertain as near as may be what was intended by the parties in doing and saying what they did. The Secretary of War was anxious to dispose of the cars; his duty was manifest. The property was depreciating in value. To Murphy he cabled in Poland, "Will be glad to receive bids through *you or others*." We italicize the last three words. To Murphy he indicated a complete willingness to accept propositions of sale from him, but do all or any part of the conversations index employment to sell exclusively for the department? On the contrary, they are impressive as an assent to receive a proposition to buy,

a decided willingness to entertain proposals to purchase from any source and from any responsible person or persons. Giving the Secretary's words the very broadest significance and construing them as we believe most favorably to the plaintiff, we are impressed with the fact that all that was intended was to say to Murphy, "Go ahead, sell the cars if you can; submit your propositions to me, and if they are accepted, we will then fix compensation, when the sale is made," without in anywise intending to irrevocably bind the Government for the payment of compensation upon the mere discovery of a purchaser. What the Secretary was willing to do was to consider a completed transaction. Otherwise he would not have left open such a wide latitude of indefiniteness, doubt, and uncertainty. The transaction which Murphy inaugurated in Poland was never consummated, the parties did not arrive at an agreement, and the sale never took place in accord therewith. In addition to all this is the fact that Murphy was an interested stockholder in the U. S. A. International Corporation, which had lost a sum in excess of two hundred thousand dollars through the expiration of the time limit in its contracts with the department, and the motive to obtain an extension of the contract and save, if possible, the forfeited sum was most compelling. The transaction suggests a possibility of doing this very thing, and a willingness of the Secretary to grant concessions in the event of an actual sale of cars by or through Murphy, notwithstanding the lapse of time, and coupled with this fact is another of especial pertinence, and that is that Poland had previously purchased 4,600 cars exactly similar to the ones here involved, and the department had made known both at home and abroad, through proper channels, that the cars were for sale. It was a matter of public notoriety.

The cases, too many to cite, uniformly hold that to entitle an agent to a commission under a contract to sell "his services," as said in *Reeves* v. *Sanford*, 227 Pac. 872, "must be the immediate and effective cause of the bargain." The services of the agent must be the proximate cause of the purchase, the activities of the agent resulting under the contract in the consummation of the enterprise undertaken. *Payseno*

v. *Swensen*, 178 Fed. 999. We find no precedent sustaining a contention that the department was liable for broker's commission for a sale of property conducted under its own initiative, by its own officers, and in accord with its own terms and conditions exclusively. The fact that Murphy had previously attempted to sell the cars to Poland and failed is wholly insufficient to predicate a claim for compensation for thereafter selling the same cars through the independent action of the department at auction, wherein eleven competitors contested for the right to purchase. The department very justly sought to deal equitably with Murphy, his claim was carefully investigated, and more than once considered by the Judge Advocate General of the Army. Two Secretaries of War passed upon it, and the final conclusion was a lack of legal authority to pay except through a special act of Congress. With this conclusion we agree. Murphy was industrious and conscientious in his efforts to sell the cars. The department accorded him full recognition in this respect. The record sustains an assertain that what he did doubtless aided in a substantial measure in giving the final sale a degree of publicity it might not otherwise have obtained. For what he accomplished in this respect, in so far as compensation is involved, this court is without jurisdiction to award a judgment. Congress may, if it sees fit, provide the remedy.

The petition is dismissed. It is so ordered.

SINNOTT, *Judge;* and GREEN, *Judge*, concur.

GRAHAM, *Judge*, took no part in the decision of this case; and MOSS, *Judge*, took no part on account of illness.

E. EDELMANN & CO. v. THE UNITED STATES

[No. J-69. Decided June 3, 1929]

On the Proofs

Excise tax; automobile accessories; clocks and window antirattlers.—Plaintiff's clocks and window antirattlers, designed, primarily adapted for, advertised and sold for the special purpose of being used as automobile accessories, *held* to be taxable as automobile accessories.

The Reporter's statement of the case:

Mr. Alex Koplin for the plaintiff.

Mr. Ralph C. Williamson, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. Arthur J. Iles* was on the brief.

The court made special findings of fact, as follows:

I. E. Edelmann & Company, during the times hereinafter mentioned, was and now is a corporation organized, existing, and operating under and by virtue of the laws of the State of Illinois, with its principal place of business located at Chicago, Illinois.

II. Plaintiff was during the period from August, 1919, to February, 1926, engaged in the manufacture and sale of automobile accessories, such as spot lights, hub caps, steering and radius rods, antirattlers, dash lamps, lever extension handles, and clocks, and made returns and paid excise taxes with respect to all of such products.

The articles which in this suit are claimed to be nontaxable are clocks and antirattlers.

The clocks which were sold by plaintiff were manufactured and sold enclosed in a nickel-plated brass case by a spring, as shown by plaintiff's Exhibit 1, by reference made part of this finding.

The record does not establish that any of the clocks in question were sold and used on other than automobiles. Sales were made principally through wholesalers and jobbers. Plaintiff published a catalog (Ex. 10), which is by reference made part of this finding, wherein, respectively, on pages 26, 27, and 28, appear the following representations:

"Five-fifteen motor clocks. Priced low enough so that every auto owner will be a prospective customer.

"'Erco' auto clock. Can be placed anywhere on the car without drilling.

"Boss auto clock. Every motorist will want one of these."

The window antirattlers in question were made of steel and rubber, as shown by plaintiff Exhibits 2 and 3, by reference made part of this finding. These consist of a bracket

which holds screw with a rubber cushion at one end and a knurled head at the other end, and a lock nut on the screw to lock it against the bracket to keep it from turning. On pages 34 and 35 of the catalog it is stated, "made to fit all cars having a wood frame."

"ANTIRATTLERS FOR WINDOWS OF CLOSED CARS"

The aforesaid clocks and antirattlers were designed and adaptable and were advertised and sold for the special purpose of being used as an automobile accessory. Said devices could be used to some extent independent of automobile usage, but the record does not establish such use, except in two or three isolated instances, and it is not shown that any sales were made by plaintiff for such purposes.

The invoices of plaintiff had stamped thereon notations that the tax amounted to one forty-first or one twenty-first of the invoices, but in making returns plaintiff computed the tax upon the total invoice price. The record does not establish the difference in tax were it computed upon the sales price after deducting the fractional part stamped on the invoices as tax with reference to payments made after January 10, 1923.

Plaintiff sold to customers merchandise which was returned from time to time, and also made deductions in the price of other merchandise which had been sold. The total amount of such items, with reference to sales included in returns made for taxes paid after July 13, 1923, is not established by the record.

III. Plaintiff filed its manufacturer's excise tax returns monthly for the period August, 1919, to February, 1926, inclusive, showing the amount of tax due thereon, which was duly assessed on such returns by the Commissioner of Internal Revenue, paid by plaintiff for the months, in the amounts, and on the dates hereinafter set forth, as follows:

Reporter's Statement of the Case

Period	Year	Month	Year	Page	Line	Amount	Date paid
Aug	1919	Oct	1919	29	5	$885.87	10/4/19
Sept		Nov		3	2	829.12	11/1/19
Oct		Jan	1920	41	1	1,393.92	1/6/20
Nov		Jan		61	9	814.05	1/8/20
Dec		Feb		46	6	805.83	2/5/20
Jan	1920	Mar		9	2	871.67	3/1/20
		Mar		10	9	8.36	3/1/20
Feb		Mar		156	7	451.75	3/30/20
Mar		May		13	7	470.29	5/1/20
Apr		June		223	5	521.50	6/30/20
May		July		21	0	528.64	7/2/20
June		July		199	7	814.90	7/31/20
July		Sept		7	0	560.12	9/1/20
Aug		Oct		4	8	663.83	10/1/20
Sept		Nov		3	2	143.32	11/1/20
Oct		Dec		5	6	384.17	12/1/20
Nov		Jan	1921	0	8	199.45	1/3/21
Dec		Feb		4	0	233.23	2/1/21
Jan	1921	Mar		39	4	732.35	3/3/21
Feb		Apr		10	6	826.59	4/1/21
Mar		May		8	2	908.12	5/2/21
Apr		June		76	7	1,055.99	6/14/21
May		July		8	3	1,105.48	7/1/21
June		Aug		54	1	1,134.29	8/11/21
July		Sept		5	1	1,072.59	9/1/21
Aug		Oct		4	3	1,546.31	10/1/21
Sept		Nov		7	7	1,458.36	11/1/21
Oct		Dec		5	6	906.74	12/1/21
Nov		Jan	1922	3	7	536.55	1/3/22
Dec		Feb		31	3	494.79	2/2/22
Jan	1922	Mar		3	6	541.50	3/1/22
Feb		Apr		6	1	558.63	4/1/22
Mar		Apr		113	0	802.50	4/28/22
Apr		June		35	9	706.59	6/6/22
May		July		2	7	1,034.22	7/1/22
June		Aug		2	5	1,604.33	8/1/22
July		Sept		4	3	2,133.12	9/1/22
Aug		Oct		1	9	2,196.26	10/2/22
Sept		Nov		4	0	1,568.83	11/1/22
Oct		Dec		5	0	1,903.68	12/1/22
Nov		Jan	1923	1	2	722.84	1/2/23
Dec		Feb		8	2	806.42	2/1/23
Jan	1923	Mar		37	3	763.30	3/7/23
Feb		Apr		59	5	791.30	4/12/23
Mar		May		39	1	875.24	5/8/23
Apr		June		41	8	642.82	5/9/23
May		July		14	1	1,252.53	7/6/23
June		Aug		2	8	1,584.09	8/3/23
July		Sept		12	8	1,547.88	9/6/23
Aug		Oct		3	2	1,377.94	10/1/23
Sept		Nov		5	2	1,605.46	11/1/23
Oct		Dec		2	4	1,703.44	12/1/23
Nov		Jan	1924	2	3	1,227.34	1/2/24
Dec		Feb		3	2	743.75	2/1/24
Jan	1924	Mar		34	0	545.69	3/8/24
Feb		Apr		33	5	457.89	4/4/24
Mar		May		53	9	592.06	5/8/24
Apr		June		15	9	716.20	6/4/24
May		July		14	9	614.29	7/3/24
June		July		106	2	574.60	7/24/24
July		Sept		9	5	391.50	9/4/24
Aug		Sept		57	9	533.82	9/29/24
Sept		Oct		58	8	725.25	10/31/24
Oct		Dec		5	8	601.52	12/4/24
Nov		Jan	1925	7	0	398.75	1/3/25
Dec		Feb		7	9	602.75	2/4/25
Jan	1925	Mar		8	3	328.23	3/4/25
Feb		Apr		1	5	340.64	4/1/25
Mar		May		11	0	322.70	5/4/25
Apr		June		12	3	492.74	6/2/25
May		July		15	5	493.59	7/2/25
June		Aug		7	8	633.77	8/4/25
July		Sept		12	3	382.44	9/2/25
Aug		Oct		2	1	428.86	10/1/25

Period	Year	Month	Year	Page	Line	Amount	Date paid
Sept.		Oct.		46	1	$302.19	10/30/25
Oct.		Dec.		17	8	47.95	12/3/25
Nov.		Jan.	1926	11	8	19.96	1/5/26
Dec.		Jan.		31	9	45.50	1/23/26
Sept., 1923, to May, 1925.		July	1925	38	9	3,713.38	10/13/25

IV. On August 14, 1926, plaintiff filed its claims for refund #355136 of manufacturer's excise tax so paid on window antirattlers and automobile clocks for the period August, 1919, to February, 1926, inclusive, in the amount of $5,302.33, which was duly rejected by the Commissioner of Internal Revenue on May 5, 1927.

On January 10, 1927, plaintiff filed its claim for refund #2365 of claimed excess over 5% legal rate of manufacturer's excise tax so paid for the period August, 1919, to August, 1923, inclusive, in the amount of $2,159.85, which was duly rejected by the Commissioner of Internal Revenue on July 5, 1927.

On January 10, 1927, plaintiff filed its claim for refund #2366 of claimed excess over 5% legal rate of manufacturer's excise tax so paid for the period September, 1923, to July, 1924, inclusive, in the amount of $707.90, which was duly rejected by the Commissioner of Internal Revenue on July 5, 1927.

On July 13, 1927, plaintiff filed its claim for refund #11173 of manufacturer's excise tax so paid on returned goods for the period May, 1923, to December, 1923, inclusive, in the amount of $365.57, which was duly rejected by the Commissioner of Internal Revenue on October 1, 1927.

The court decided that plaintiff was not entitled to recover.

SINNOTT, *Judge*, delivered the opinion of the court:

Plaintiff, a corporation of the State of Illinois, engaged in the manufacture and sale of automobile accessories, filed suit on February 27, 1928, to recover the sum of $8,535.65 with interest from dates of payment alleged to have been illegally exacted by the United States as excise tax on the

sales of window antirattlers and clocks, and from the assessment of taxes in excess of the required rates and from rejections of claims for credits on rescinded sales and returned goods made and sold by plaintiff between the dates of August, 1919, and February, 1926.

The bases of the claims are as follows:

On August 14, 1926, plaintiff filed its claim for refund #355136 of manufacturer's excise tax so paid on window antirattlers and automobile clocks for the period August, 1919, to February, 1926, inclusive, in the amount of $5,302.33, which was duly rejected by the Commissioner of Internal Revenue on May 5, 1927.

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The findings herein leave the sole question involved in this case, whether the window antirattlers and clocks in question are taxable under section 900 of the revenue act of 1918, 40 Stat. 1122, section 900 of the revenue act of 1921, 42 Stat. 291, and section 600 of the revenue act of 1924, 43 Stat. 253, 322.

Section 900 of the revenue act of 1918, *supra*, provides:

"That there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufac-

turer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold or leased:

"(1) Automobile trucks and automobile wagons (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), 3 per centum;

"(2) Other automobiles and motor cycles (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), except tractors, 5 per centum;

"(3) Tires, inner tubes, parts, or accessories, for any of the articles enumerated in Subdivision (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in Subdivision (1) or (2), 5 per centum."

The pertinent sections of the revenue act of 1921, *supra*, and the revenue act of 1924, *supra*, are the same, with the exception that the act of 1924 reduced the amount of tax from 5% to 2½%.

Treasury Regulations No. 47, article 15, defines "part" or "accessory"—

"Articles, however, which ordinarily would be classed as commercial commodities become parts when because of their design or construction they are primarily adapted for use as component parts of such vehicles. Component parts or articles taxable under this definition are taxable when sold separately if they have reached such stage of manufacture that they are primarily adapted for use as such a component part."

Article 16 provides for the taxation of—

"Any article designed to be attached to or used in connection with such vehicle to add to its utility or ornamentation or which is primarily adapted for use with such vehicle whether or not essential to its operation."

Plaintiff's clocks and antirattlers are clearly within the purview of the statute and the above Treasury Regulations. They were designed and were primarily adapted for and were advertised and sold for the special purpose of being used as automobile accessories. They perhaps could be used to some extent independently of automobile usage, but the

record does not establish such use, except in two or three isolated instances.

Plaintiff made no sales of these articles except for automobile purposes. We can reach no other conclusion but that the devices in question were automobile accessories, taxable under the statute.

With reference to plaintiff's claim, referred to in paragraphs two and three of Finding IV, wherein plaintiff contends that it should have been taxed upon the invoice price, less the tax, instead of upon the total invoice price, it is questionable whether this position is well taken, under the authority of *Lash's Products Co.* v. *United States*, 278 U. S. 175. However, the record concerning this matter is unsatisfactory. It does not establish the difference in tax, were it computed upon the sales price after deducting the fractional part stamped on the invoices as tax with reference to payments made after January 10, 1923, payments on or before said date being barred by the statute of limitations.

With reference to plaintiff's claim predicated upon returned goods, referred to in the last paragraph of Finding IV, the record is likewise unsatisfactory, as the total amount of such items with reference to sales included in returns made for taxes paid after July 13, 1923, is not established by the record, payments on or before July 13, 1923, being barred by the statute of limitations. See revenue act of 1921, 42 Stat. 314–315, and the revenue act of 1924, 43 Stat. 342.

The petition will be dismissed. It is so ordered.

Green, *Judge*, and Booth, *Chief Justice*, concur.

Graham, *Judge*, took no part in the decision of this case; and Moss, *Judge*, took no part, on account of illness.

DOW PUMP & DIESEL ENGINE CO. v. THE UNITED STATES

[No. E-475. Decided June 3, 1929]

On the Proofs

Contract for pumps; internal lubrication; departmental regulations; compliance with specifications.—A regulation of the Navy Department requiring pumps for its vessels to be constructed

so that they could be operated without internal lubrication, neither brought to the knowledge of the contractor nor required by its contract to be complied with, is not a part of the contract, and pumps constructed, in line with long-standing practice, with internal lubrication, and otherwise in accordance with specifications, entitle the contractor to the contract price.

The Reporter's statement of the case:

Mr. Horace S. Whitman for the plaintiff.

Mr. George Dyson, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff was and is a corporation duly incorporated under the laws of the State of California in the year 1912. Its plant and office are located in Alameda, California.

II. Under date of October 29, 1917, a contract, known as contract No. 32758, Schedule 1895½, was entered into between the plaintiff and the United States, represented by the Paymaster General of the Navy, for furnishing by the plaintiff to the United States pumps and pumping equipment for destroyer No. 135 to be built at the navy yard, Charleston, South Carolina, and for destroyers Nos. 136 and 141, both inclusive, to be built at the navy yard, Mare Island, Calif., a copy of which said contract was attached to the petition as Exhibit "A" and is made a part hereof by reference. This contract was modified under date of January 10, 1918, by contract number Supplementary 32758, Schedule 1895½, for furnishing by the plaintiff to the United States additional pumps and pumping equipment for destroyers Nos. 135 to 141, both inclusive, a copy of which said supplementary contract was attached to the petition as Exhibit "B" and is made a part hereof by reference. This contract was further modified under date of April 18, 1919, by contract number Supplementary 32758, for furnishing by the plaintiff to the United States pumps and pumping equipment for destroyers Nos. 336 to 341, both inclusive, a copy of which said supplementary contract was attached to the petition as Exhibit "C" and is made a part hereof by

reference. This contract was further modified under date of July 26, 1918, by contract No. 32758a, Schedule 1895½, for furnishing by the plaintiff to the United States additional pumps and pumping equipment for destroyers Nos. 336 to 341, both inclusive, for delivery at the navy yard, Mare Island, Calif., a copy of which said contract No. 32758a was attached to the petition as Exhibit "D" and is made a part hereof by reference.

III. In all of these contracts it was provided that all pumps were to be in accordance with "'General Specifications for Machinery G–1,' issued by the Bureau of Steam Engineering, June 15, 1916."

Specification for machinery G–1 contained the following:

"Valve chests of pump steam cylinders will be drilled and tapped for small oil cups. Cups will not be fitted, but the holes will be plugged."

IV. The defendant conveyed no other information to the plaintiff nor did the plaintiff have any other information as to its requirements for pumps than that contained in the contracts and specifications referred to in the said contracts, nor was any information furnished the plaintiff by the defendant nor did the plaintiff have any knowledge of the character of the other machinery or type of boilers to be used upon destroyers for which the plaintiff was to supply the pumps. The specifications were complete and minute in the greatest detail.

V. The plaintiff and its predecessors had manufactured pumps for the Navy since 1888. Prior to the occurrences hereinafter mentioned all pumps designed and manufactured by the plaintiff and its predecessors, including those for the Navy Department, had been designed and manufactured to operate with internal lubrication of the valve chests of the steam cylinders. Of these pumps three sets were manufactured for destroyers built about 1902. Eighty-five of such pumps had been furnished the Navy Department and accepted in the years 1916 and 1917. These, however, were not for use on destroyers. In the contracts or specifications for these eighty-five pumps a provision as to drilling and plug-

ging of holes appeared identical with that quoted from General Specification G-1 in Finding III. The plugging of all holes drilled is likewise customary with pump manufacturers.

VI. The plaintiff proceeded to design and manufacture pumps intended to be operated with internal lubrication of the valve chests of the steam cylinders. These pumps were designed to use a pure mineral oil at the rate of about one drop per minute. This is considered a small quantity.

VII. During all of the time required for the manufacture of these pumps representatives of the Navy Department, Office of the Inspector of Engineering material at San Francisco, Calif., were present for the purpose of observing the details of manufacture and material. When the pumps were completed each was subjected to operating tests, the first of which tests began on April 10, 1918. These tests were conducted in the presence and under the observation of the United States inspection officers and consisted of operation of the pumps under steam pressure for about eight hours. At these tests oil cups containing oil were inserted in the holes drilled in the valve chests of the pumps' steam cylinders. The use of this oil for the purpose of providing internal lubrication of the steam chests was plainly visible to the inspecting officers at the time of each and all of the tests, and no objection was made by them to such a use. Upon the completion of the tests, at the suggestion of one of the officer inspectors of the Navy Bureau of Engineering, the plaintiff coated the interior of the steam-valve chests and the steam cylinders of the pumps with a mixture of graphite and oil, and also poured oil into the cylinders, including the steam ends of the completed pumps, to prevent rust pending the installation and use of the pumps on shipboard.

VIII. One hundred and forty-three pumps, more than 79 per cent of the total number, were so built, tested, treated, and delivered by the plaintiff to the defendant at the Mare Island Navy Yard, or at Charleston, S. C., on or before September 5, 1918.

IX. A complement of these pumps was delivered and installed on the U. S. S. *Ward*. On August 31, 1918, the dock

trial was run for this boat. At this trial the pumps were operated without the use of oil cups and oil. The run was apparently satisfactory. In the light of future happenings, the satisfactory performance of the pumps at this time is explained by the presence of a quantity of oil remaining in the pumps resulting from the use of graphite and oil to prevent rust. On September 1 the first of the sea trials was had. At this sea trial the pumps failed to function properly because of the sticking of the slide valves in the steam chests for the reason that no internal lubrication was used on the steam ends of the pumps. Trials were also conducted on the 2nd, 3rd, and 4th with like results. On September 4th the plaintiff was notified of this failure of the pumps to operate properly, and its representative went aboard to make an inspection of the pumps, in an attempt to determine the reason for the stoppages. It immediately became apparent to the plaintiff's representative that the stoppages were due to lack of lubrication and he so informed the representatives of the defendant. The plaintiff was thereupon advised for the first time that the use of oil cups and internal lubrication was not permitted by the Navy on the steam ends of pumps especially on such ships as employed an express type of boiler.

Oil for internal lubrication of steam cylinders of pumps had been in use by the Navy on its vessels for many years, but a feeling had gradually developed among officers of the Bureau of Engineering that the use of oil should be minimized as far as it was found practicable to do so. The experience of the bureau was reflected by certain paragraphs of "Naval Instructions," issued by the bureau, under the direction of the Secretary of the Navy in the year 1913, to officers in the Navy. Among others of these paragraphs which stressed the matter of keeping the boilers and water free from impurities, is the one most pertinent to the use of oil. It appeared as follows:

"Internal Lubrication of Cylinders:

"Instruction 3107. (1) No tallow or oil of vegetable or animal origin shall be used for the interior lubrication of the steam cylinders and valve chests, and as little as possible of any kind of oil shall be used for this purpose. (This

prohibition shall apply to every cylinder and valve chest for whatever purpose used.) Under ordinary conditions of working with saturated steam, the water of liquefaction derived from the steam furnishes ample lubricant for the internal working parts, but, if this does not prove sufficient, pure mineral oil shall be employed.

"Lubrication of piston rods and valve stems:

"(2) Care shall be taken that the oil used for lubricating the piston rods and valve stems is not drawn into cylinders or valve chests. When main engines are fitted with forced lubrication systems care shall be taken to prevent the oil from being splashed on piston rods or valve stems, particularly from crossheads or guides."

This instruction was modified by instructions issued in 1916, among which was the following:

"*Lubrication*

"(33) A very small amount of cylinder oil should be used on the steam ends of the rods, and all outside moving parts should be lubricated with mineral oil. No oil should be used in steam or water cylinders or valve chests."

The plaintiff had no actual knowledge of the existence of these instructions or of the policy of the Navy Department in this regard.

X. All of the pumps as originally designed and manufactured by the plaintiff under the said contracts would have functioned properly if internal lubrication had been used in their operation. The minute quantity of oil required for the pumps would not have made any difference at all in the operation of the vessel and would not have hurt anything.

XI. Efforts were thereupon made by the plaintiff and defendant to make the pumps function without internal lubrication by adjustments to reduce friction on the slide valves, but it soon became apparent that the pumps could not be made to function without internal lubrication unless larger chest steam pistons were constructed. The plaintiff thereupon at once began the preparation of plans for a steam valve gear with increased chest piston area which would enable the pumps to operate without internal lubrication of the steam ends, completing the same about September 15, 1918.

Reporter's Statement of the Case

XII. At or about the time of the difficulty with the pumps on the sea trial of the *Ward*, the plaintiff was advised that all of the destroyers for which the plaintiff was manufacturing pumps would be duplicates of the *Ward*, and that the use of internal lubrication of the pumps on those destroyers would not be permitted.

XIII. On September 28, 1918, the Bureau of Steam Engineering telegraphed the plaintiff advising that the trial board of the destroyer *Ward* had recommended that fourteen of the Dow pumps be replaced by another make, due to their unsatisfactory operation, and that this recommendation had been concurred in by the engineer officer and the commandant at the Mare Island Navy Yard. The plaintiff was requested to submit any comment or objection it might have. This telegram to plaintiff was answered September 30 stating that the problem was being worked on by its representatives and that the pumps on the *Ward* would be put in satisfactory working condition as quickly as possible. It objected to any substitution of pumps. The navy yard had, however, proceeded on September 26 to begin the manufacture and installation of new ends known as Warren steam ends, to be used in place of those manufactured by the plaintiff. This manufacture and installation were completed by December 1. Although this manufacture and installation of the new steam ends were being accomplished by the Navy Department's own men at the navy yard, this fact does not seem to have been known by the Bureau of Steam Engineering, for on October 8, 1918, it wired the plaintiff company asking for immediate information as to a definite date for completion of the pumps for the destroyer *Ward*. To this telegram plaintiff answered that the *Ward* pumps would be completed by October 18. By letter of October 23, 1918, the acting inspector of engineering material advised the Bureau of Steam Engineering that the plaintiff had modified the chest pistons of the pumps; that tests had indicated that the pumps, with this modification, would fill the requirements, and that these changes had been authorized by the engineer office at Mare Island Navy Yard. A telegram of the inspector sent to the bureau on October 26 advised that "all Dow pumps work perfectly in the shop."

The Bureau of Steam Engineering on October 30 wired the Mare Island Navy Yard that it had approved its request to manufacture Warren steam ends for all pumps of the *Ward* and *Boggs* (the latter a destroyer fitted with pumps about the same time as the *Ward*). The inspector was requested to notify the plaintiff of this outcome and that the cost would be chargeable to it. This notification, however, did not go forward to the plaintiff until November 21.

By letter of November 2 the inspector suggested to the plaintiff that when it sent the new steam chests for the *Ward* pumps that it send competent men to insure proper fitting.

On November 7 the plaintiff telegraphed the Bureau of Steam Engineering that it understood that authorization had been given to substitute Warren steam ends; that the plaintiff had a complete outfit ready for the *Ward* which had been passed by the inspector and that they were ready to submit to any test required. To this telegram the bureau replied that the plaintiff's action had been too long delayed and that it was too late to reconsider its decision in the matter of the *Ward* and *Boggs* but that the plaintiff would be given an opportunity to make good on the other pumps where the vessel's date of completion was not involved.

XIV. As the result of the manufacture and installation by the navy yard of the Warren steam ends there was deducted by the defendant from moneys otherwise due the plaintiff the sum of $30,561.41, which represents the cost of this change in the steam ends of the pumps for the *Ward* and the *Boggs*.

The other pumps which had been delivered to the defendant were returned to the plaintiff and it proceeded to alter and change the steam ends in these and such as had not yet been delivered. These changes were accomplished in the years 1918 and 1919. For the year 1918 the plaintiff's total overhead was $250,721.76 and total direct labor $343,-345.89. Overhead therefore for that year represented 73 per cent of the cost of direct labor. For the year 1919 the plaintiff's total overhead was $262,133.13 and total direct labor $93,425.73. Overhead therefore for that year represented 187 per cent of direct labor. Applying these per-

centages to the direct labor costs of the changes here involved together with other costs results as follows:

Direct labor, 1918	$6, 427. 54
Overhead, 73 per cent, 1918	4, 692. 10
Direct labor, 1919	11, 151. 56
Overhead, 187 per cent, 1919	20, 853. 41
Replacement material	1, 837. 34
Expense at Mare Island	2, 045. 28
Total	47, 007. 23

XV. These corrections necessary to operate the pumps without internal lubrication of the steam ends were made in eleven sets of pumps, five sets of the pumps as altered being delivered prior to September 9, 1919, and six sets subsequent to September 9, 1919.

XVI. Had the plaintiff known or been advised that the pumps were intended to be operated without internal lubrication at the time the contracts were awarded it, the plaintiff could have designed and manufactured such pumps for the same cost as the pumps they did manufacture, which were intended to be internally lubricated.

Had the plaintiff been advised at the time the first tests of the pumps were run that internal lubrication was not to be allowed, the change to pumps to be operated without internal lubrication could have been made for an added cost to it of $7,500.00.

The court decided that plaintiff was entitled to recover.

Graham, *Judge*, delivered the opinion of the court:

This case involves a contract for pumps for sundry uses in connection with torpedo destroyer vessels being constructed at that time. The plaintiff was a large manufacturer of pumps, and had been furnishing pumps to the Navy Department for use on vessels since the year 1888. In fact, practically all the vessels constructed on the Pacific seaboard and some on the Atlantic seaboard had been supplied with pumps by the plaintiff, and had always given satisfaction.

The plaintiff constructed the pumps here in dispute; operating tests were conducted at the plaintiff's plant when the pumps were completed, in the presence of naval inspectors. At these tests pumps were operated under steam pressure for

eight days, and oil cups containing oil were inserted in the holes drilled in the valve chests of the pumps' steam cylinders, affording internal lubrication of the steam chests. These cups were prominently placed, and it was plain to anyone who could see and knew anything of pumps that they were being internally lubricated; and this must be held to have been evident to the naval inspectors, and that they knew internal lubrication was being used. There was no objection upon their part at the time.

On or before September 5th more than 79% of the pumps had been constructed and delivered, and the balance was in process of construction. During the last days of August, 1918, under the trial of the destroyer *Ward*, the pumps functioned properly without internal lubrication, due probably to the presence of the oil in the steam chests placed there at the time of shipment to prevent rust. When the sea tests were later made no internal lubrication was used, and as a result the pump valves stuck and the pumps failed to function properly. Thereafter, when the plaintiff's engineer appeared for the purpose of investigating the trouble with the pumps, the plaintiff was told—and this was its first notice—that the pumps were to be operated without internal lubrication.

The one question, therefore, is, and there is but one question in the case, whether the plaintiff, under its contract, was required to construct these pumps so that they could be operated without internal lubrication. The contract did not in terms so provide. The defendant relies upon the following provision of the contract, which is the only one mentioning the use of oil:

"Valve chests of pump steam cylinders will be drilled and tapped for small oil cups. Cups will not be fitted, but the holes will be plugged."

The defendant contends that this was sufficient to give the plaintiff notice that the pumps were to be operated without internal lubrication. We do not think that this contention can be sustained when all the facts are considered. It is true that at the time these pumps were contracted for and manufactured there was a regulation in the Navy Depart-

ment, known apparently to some of its officers, requiring pumps to be constructed so that they could be operated without internal lubrication. However, the plaintiff, as stated, had been making pumps for the Navy for many years prior to the making of this contract, and all the contracts contained this identical provision. It does not appear that the plaintiff had any knowledge of the regulation in the Navy Department, and it certainly was not required by its contract to comply with such a regulation. In fact, the whole difficulty could have been avoided by a small amount of ordinary care upon the part of the representatives of the Navy Department, by inserting such a provision in the contract, or notifying the plaintiff of the regulation before the pumps were constructed. The fact that this was not known to the plaintiff, and, it must be inferred, not known to the naval officers who were present at the tests, is shown by the fact that at the tests the pumps were operated by internal lubrication.

It is also evident from the facts that the plaintiff promptly took steps to make and did prepare a change in the pumps which would cause them to operate in the manner desired. It notified the defendant on the 30th of September, 1918, that the problem was being worked out, and it was worked out with the cooperation of the Bureau of Steam Engineering. The inspector of engineering material notified the bureau that the plaintiff had modified the chest pistons of the pumps, and that the tests had indicated that the pumps, with this modification, would fill the requirements, and that these changes had been authorized by the engineer office at Mare Island Navy Yard, and the inspector further notified the bureau on October 26th that "all Dow pumps work perfectly in the shop." Thereafter, on November 21, the plaintiff was notified that the defendant on its own account had made changes and supplied other steam ends, known as the Warren steam ends, the cost of which would be deducted, and was deducted, from the price agreed to be paid for these pumps under the contract.

The pumps were returned to the plaintiff, they were altered in accordance with the requirements of the defendant, returned to the defendant and used, and the additional

expense in making these alterations, together with the sum deducted, as just stated, by the defendant makes up the sum sought to be recovered by the plaintiff in this action.

It is too plain to require discussion that there was no implied warranty of these pumps to operate without internal lubrication. They were built as the plaintiff had always built pumps for the Navy under a provision that had been in previous contracts. The defendant had ordered specific pumps, and they were manufactured and supplied by the plaintiff in accordance with the contract and specifications. What was to be done with them was not a matter that concerned the plaintiff so long as the contract and specifications were complied with. It is very clear that the situation out of which this suit sprang was due to the fault of the Navy Department and not of the plaintiff.

The plaintiff is entitled to recover the sum of $75,154.24, claimed in its petition, being the amount due for expenditures in altering the pumps and the sum withheld by the Government on account of cost of changes, and it is so ordered.

SINNOTT, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

MOSS, *Judge*, took no part in the decision of this case because of illness.

CHICAGO FROG & SWITCH CO. v. THE UNITED STATES

[No. H-529. Decided June 3, 1929]

On the Proofs

Income and profits taxes; basis of computing inventories.—Plaintiff, which employed steel rails for its raw material in the manufacture of railroad switches, frogs, and crossings, used at the close of the taxable year, in the inventory of rails then on hand, the cost price paid at the beginning thereof, regardless of the price paid thereafter, and made its tax returns accord-

ingly. *Held*, that a Treasury decision, promulgated during the year, that inventories, for the purpose of tax returns, " must be taken either (a) at cost or (b) at cost or market price, whichever is lower," had the effect of a regulation, which being reasonable was enforceable, and that where the actual cost of the said rails was lower than the market at the end of the year, the material should have been inventoried at the actual cost and income and profits taxes paid accordingly.

Same; annual basis of tax returns; spread of gains and losses.—The tax laws in general contemplate return of income and profits on an annual basis, and a use of inventories that results in spreading gains and losses over a number of years is unauthorized.

The Reporter's statement of the case:

Mr. Karl D. Loos for the plaintiff. *Mr. Preston B. Kavanagh* and *Butler, Lamb, Foster & Pope* were on the brief.

Mr. George H. Foster, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. Plaintiff, Chicago Frog & Switch Company, is now, and was during all of the times hereinafter mentioned a corporation duly organized under the laws of the State of Illinois, with its principal office and place of business in the city of Chicago, State of Illinois. Prior to May 2, 1923, its name was Morden Frog & Crossing Works.

During the year 1917 plaintiff was engaged in the business of manufacturing and selling switches, frogs, and crossings, and appliances pertaining thereto for use on steam railroads. It used steel rails as raw material from which to manufacture its products.

II. Plaintiff filed its income and profits tax return for the year 1917 in due time and on the prescribed form. This return was audited by the Commissioner of Internal Revenue, and following such audit, tax for 1917 was assessed against plaintiff in the total sum of $218,644.45, based upon

Reporter's Statement of the Case

a net income of $609,929.19, computed by the Commissioner of Internal Income as follows:

Net income	$609, 929. 19
Less excess-profits tax (sec. 210, 1917 act)	193, 713. 51
Amount taxable at 2 per cent	416, 215. 68
Less 1917 dividends	1, 050. 00
Amount taxable at 4 per cent	415, 165. 68
Excess-profits tax	193, 713. 51
Normal tax at 2 per cent	8, 324. 31
Normal tax at 4 per cent	16, 606. 63
Total tax	218, 644. 45

Said tax so assessed was paid by plaintiff as follows:

May 17, 1918	$100, 000. 00
June 15, 1918	96, 238. 00
March 28, 1923	374. 06
March 30, 1925	22, 032. 39
Total tax paid for 1917	218, 644. 45
March 30, 1925, interest on additional tax paid	2, 187. 16

III. On December 31, 1917, plaintiff had on hand open-hearth steel rails in the amount of 6,475,609 pounds and Pennsylvania open-hearth steel rails in the amount of 1,377,-681 pounds. In the closing inventory for 1917 plaintiff inventoried said open-hearth steel rails at a unit price of $1.40 per hundred pounds and said Pennsylvania open-hearth rails at a unit price of $1.60 per hundred pounds. The amount shown by plaintiff's inventory at the close of 1917 (January 1, 1918) for open-hearth rails was $90,658.53, and for Pennsylvania open-hearth rails, $22,042.90.

The unit price of $1.40 per hundred pounds was based upon the cost of steel rail at 1.34 cents per pound or $30.00 per gross ton plus 53 cents per gross ton for freight and 50 cents per gross ton representing the cost of unloading. The unit price of $1.60 per hundred pounds was taken on the same basis as the open-hearth steel rail plus $3.80 per ton added to the cost by the manufacturer for the extra specifications and tests and 25 cents per ton for inspection. Both

unit prices as used in plaintiff's closing inventory were based on a base price for steel rails of $30.00 per gross ton.

IV. In computing and adjusting the tax which was paid by plaintiff for 1917, the Government adjusted the closing rail inventory for 1917 with respect to open-hearth rail and Pennsylvania open-hearth rail, the Government using as the unit price $1.81 per hundred pounds on open-hearth steel rail and $1.98 per hundred pounds on Pennsylvania open-hearth steel rail. As a result of this unit price the open-hearth steel rail inventory was shown at $117,208.52, and the Pennsylvania open-hearth at $27,278.08. By reason of this adjustment the net income of plaintiff was increased in the amount of $31,785.17.

The unit price used by the Government, of $1.81 per hundred pounds for open-hearth rail, was based upon the base price of $40.00 per gross ton plus allowance for freight and unloading, and the unit price of $1.98 per hundred pounds on the Pennsylvania open-hearth rails was based upon the base price of $40.00 per gross ton plus $3.80 for specifications and extra tests plus allowances for freight and unloading.

V. The cost of steel rails at the beginning of 1917 was $30.00 per gross ton for open-hearth rails and $33.80 for Pennsylvania open-hearth rails plus cost of freight and unloading. The cost of said rails at the close of 1917 was $40.00 per gross ton for open-hearth rails and $43.80 per gross ton for Pennsylvania open-hearth rails plus the cost of freight and unloading. The market price for steel rails, open-hearth and Pennsylvania open-hearth, at the beginning of 1917 was $30.00 per gross ton, and at the end of 1917 was $40.00 per gross ton. The addition for specifications of $3.80 for the Pennsylvania open hearth was a matter of contract, and these specifications added nothing to the market price.

Plaintiff was required to and did keep on hand a large stock of steel rails sufficient to meet requirements for some four to six months in advance. In 1917 the volume of business was large and it was difficult to obtain rails under conditions then existing. This made it necessary to keep on hand a larger supply than in some other years.

VI. Plaintiff's inventory of steel rails was regularly taken at the close of the year as a physical inventory, several men being sent out to tally the number of rails, and their reports were sent to the office and there tabulated and extended. It was the practice of the company in taking its inventory of steel rails to use a fixed price, the same at the close of the year as at the beginning of the year. This practice was adopted so that the books would show the actual profit on operation without a fictitious profit or loss based on fluctuations in the price of raw material. Following the enactment of the excess-profits tax law, this practice of taking the inventory was changed and made to show at a higher price any excess amount of inventory on hand at the close of the year compared with that on hand at the beginning of the year.

From 1913 up to and including the first part of 1917 the base price of steel rails was $30.00 per gross ton. Subsequent to 1917 the price of steel rails continued to increase and went as high as $57.00 per gross ton. In 1921 and later years the price dropped back to $43.00 per gross ton. At the close of 1917 the market price was higher but the company continued to use its inventory prices on the basis of $30.00 per gross ton. This practice was continued except that in years when the inventory at the end of the year showed a greater quantity on hand than at the beginning of the year the excess quantity was inventoried at the price prevailing during the year.

The policy with respect to the taking of inventories was adopted because of the experience which the company had in 1911 and 1912 when there was a considerable fluctuation in the price of steel. Under the method of inventory then in use the profit was increased in one year by over $90,000.00 on account of the increased value of the inventory. The following year $70,000.00 had to be charged off because of fluctuation downward. As a result of these fluctuations profits and losses were shown which did not actually occur, because practically the same tonnage of steel was carried on hand at all times. From that time on the practice of using in its inventories the unit price based upon $30.00 per gross ton was followed.

VII. The total quantity of open-hearth rails received during 1917, purchased at a price of $40.00 per gross ton, was 3,873,350 pounds; all other open-hearth rails purchased during the year was at a price of $1.34 per hundred pounds or $30.00 per gross ton. Of the 6,475,609 pounds of open-hearth rails on hand at the close of 1917 not more than 3,873,350 pounds cost $40.00 per gross ton and at least 2,602,259 pounds cost only $30.00 per gross ton ($1.34 per hundred pounds).

The closing inventory for 1917, as taken by the plaintiff on the basis of unit prices of $1.40 and $1.60 per hundred pounds for open-hearth and Pennsylvania open-hearth steel rails, respectively, was entered in plaintiff's books of account and entered into the determination of income based upon plaintiff's books.

VIII. On March 4, 1926, plaintiff filed its claim for refund of the alleged overpayment in taxes and interest thereon for the year 1917. The claim for refund recited, among other things, as a reason for the allowance thereof:

"The revenue agent erroneously added to the company's net income for 1917 the sum of $31,785.17, representing adjustment of inventory at the close of 1917 upon 6,475,609 lbs. of open-hearth rails and 1,377,681 lbs. of Pennsylvania open-hearth rails."

The claim for refund also stated the practice of the plaintiff with reference to making inventories, claimed that the method used by the revenue agent was erroneous, and included a computation of the tax made upon what the plaintiff claimed to be the correct basis, which showed an overpayment of tax in the amount of $11,396.38 and an overpayment of interest in the amount of $1,131.32. Said claim for refund was rejected in full by the Commissioner of Internal Revenue on or about November 1, 1926. If plaintiff's method of making up its inventories was correct and in accordance with the law, it overpaid its tax in the sum of $11,396.38, in addition to which there would be interest applicable to the overpayment amounting to $1,131.32, making a total of $12,527.70, as specified above, for which it claims a refund.

IX. If the plaintiff was not entitled to make up its inventories in the manner shown in its return, but is now entitled to have its inventory at the close of the year 1917 made on the cost of the rails on hand, so far as shown by the evidence, the amount of refund which should be allowed is $4,205.14.

The court decided that plaintiff was entitled to recover, in part.

GREEN, *Judge*, delivered the opinion of the court:

This case raises a question as to the proper manner of making inventories for tax purposes in the year 1917. The plaintiff filed its tax return for that year and after examination by the Bureau of Internal Revenue the net income of plaintiff as returned was increased $31,785.17 as the result of an adjustment of the inventory of rails on hand December 31, 1917. The plaintiff, which kept its books on an accrual basis and used inventories to determine its net income, inventoried the rails on hand at a so-called base or standard price, which was the price at the beginning of the year, and it is not claimed that this price was either cost or market for the rails which were on hand December 31, 1917. The Commissioner of Internal Revenue, in adjusting the inventories, valued the rails on hand at the prevailing market price on December 31, 1917, which resulted in an increase in the inventory as stated above and an increase in plaintiff's taxes for the year 1917. Plaintiff paid the taxes so assessed and filed an application for a refund thereof and in this action asks judgment for the alleged overpayment and interest thereon. The plaintiff in taking its inventory used a fixed price, the same at the close of the year as at the beginning of the year. The price used at the beginning of the year was the cost price at that time and was also taken by the defendant in computing the amount of the inventory at that date.

The plaintiff had adopted this method of taking inventories in pursuance of a practice established several years before, its object being to avoid taking credit on its books for profits which might not be realized owing to the fact that it was compelled to keep a substantial amount of rails on hand at all times.

The statutes pertaining to the return of income and profits taxes for 1917 did not prescribe the manner in which inventories should be made. A Treasury Decision of December 19, 1917, promulgated by the commissioner, held that such inventories should be made at cost, or cost or market, whichever was lower, and had the force and effect of a regulation. If this decision was made in accordance with the law, and in establishing this regulation the commissioner was acting within his authority, the acts of the commissioner involved in this case must be approved. The plaintiff, however, contends that the commissioner had no authority in law to make any regulation with reference to inventories, and as the statute laid down no definite rule, it had the right to establish one for itself, provided the method used clearly reflected its income for the year 1917 and was in accordance with good accounting and sound financial management. The plaintiff also contends that it had consistently followed this method since 1912 and that during a period of years it would give proper results. It becomes necessary to determine whether this argument is well founded.

Section 1005, under Title X, Administrative Provisions, of the revenue act of 1917 provides:

"That the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, is hereby authorized to make all needful rules and regulations for the enforcement of the provisions of this act."

In ascertaining the income of concerns conducting a busi ness such as that of plaintiff that requires large stocks to be carried, it was absolutely necessary to have inventories made, and the provisions of the act could not be enforced without them. There is no merit in the contention that the commissioner did not have authority to make a regulation requiring inventories. The only question is whether the regulation was appropriate, which, in our opinion, depends upon whether the method prescribed by it would clearly reflect the income. On the other hand, if the method taken by plaintiff clearly reflected the income and was in accordance with good accounting, we do not think any regulation made by the commissioner would make it invalid.

There is nothing in the evidence to show that the method adopted by plaintiff clearly reflected its income for the year in question or that it was in accordance with good accounting. It may have been sound financial management, as it was quite conservative in its credits. Sound management is probably always conservative, but questions of management and questions of taxation should not be confused. The burden was upon the plaintiff to show that the method prescribed by the Treasury Decision did not correctly reflect the income and was not in accordance with good accounting. Not only is there nothing in the evidence to show that the method used by the bureau was not a proper one, but there is some evidence to indicate that it was proper. We arrive at this conclusion from an examination of the revenue act of 1918, 40 Stat. 1057, and the regulations established thereunder, which, we think, although enacted after the time when the taxes in the case at bar accrued, is some evidence of what the proper rule should be. Section 203 of the act of 1918 reads as follows:

"SEC. 203. That whenever in the opinion of the commissioner the use of inventories is necessary in order clearly to determine the income of any taxpayer, inventories shall be taken by such taxpayer upon such basis as the commissioner, with the approval of the Secretary, may prescribe as conforming as nearly as may be to the best accounting practice in the trade or business and as most clearly reflecting the income."

We held in the case of *Riverside Mfg. Co.* v. *United States*, No. F-324, decided February 4, 1929 [67 C. Cls. 117], that the 1918 statute gave the commissioner authority to make this regulation. The Treasury decision of 1917 was to the same effect as the regulation, but as there was no express authority for it, it becomes necessary to determine whether the decision promulgated a reasonable rule.

This rule has been applied in cases so numerous that the number can not be estimated. In none of them, so far as we are aware, has there been any exception taken on the ground that it was arbitrary or that it did not conform to the best accounting practice or clearly reflect the income. On the contrary, it seems to have been approved by the au-

thors of works on income-tax practice and authorities on accounting. The only decision to which our attention has been called is that of *United States* v. *Kemp*, 12 Fed. (2d) 7, in which it was held that the regulations promulgated by the commissioner were reasonable and fair and within his authority to make. With this statement we agree, even as applied to conditions in 1917, when there was no specific statute on the subject but merely the general statute with reference to regulations which we have quoted.

It should be observed also that while the practice of plaintiff with reference to making its inventories would probably give a fair average of its income through a number of years, there is nothing in the law that justifies such a practice. The law contemplates that each year should be taken by itself. The method adopted by the plaintiff would have the practical effect of carrying the losses of one year over into the succeeding years and with one exception not necessary to specify here the law does not permit this to be done. On the contrary, as we think, the law contemplates that income and profits taxes should be returned on an annual basis. No doubt there are many people who would like to have both gains and losses spread over a number of years as it would greatly reduce their taxes, but the law does not authorize this practice.

Besides this, the figure taken by the plaintiff as a basic price for its inventories is, so far as appears from the evidence, an entirely arbitrary one. There is nothing in the evidence to show why some larger or smaller figure might not just as well have been taken. We think it quite clear that the plaintiff can not take a basic price that suits its convenience in the management of its business regardless of whether this correctly reflects annual profits or losses.

The fact that plaintiff had for a number of years been following an erroneous practice in making up its inventories for income-tax purposes is no justification. Our attention has been called to some decisions by the Board of Tax Appeals which, it is claimed, hold that where a consistent practice has been followed for years in making up inventories that method will be preferred. An examination in full of the decisions in these cases will make it evident that no such

general rule is laid down, although it may have been applied in some particular cases because in those instances it did not have the effect of distorting the income. The basic principle of these cases is that the commissioner could not take one method in making up the inventory for the beginning of the year and another method for the inventory at the close of the year, as this would have the effect of distorting the income. See *Appeal of Boyne City Lumber Co.*, 7 B. T. A. 36, 58; *Appeal of Sinsheimer Bros., Inc.*, 5 B. T. A. 918. These decisions, however, apply to the alternative claim made by the plaintiff, which will next be discussed.

Another and more difficult question remains in the case. The plaintiff insists that even if defendant's theory as to the law in the case is correct, it has not been properly applied by the commissioner to the facts in the case. The record shows that at the close of 1917 there were 6,475,609 pounds of open-hearth rails on hand and that not more than 3,873,350 pounds cost $40.00 per gross ton, and at least 2,602,259 pounds cost only $30.00 per gross ton. As previously stated, the market price at the close of 1917 was $40.00 per gross ton. Even if we assume that the presumption is that the rails first bought would be first used, there was on hand at the close of the year at least the last-named amount of open-hearth rails which had cost only $30.00 a ton. It is plain that if the plaintiff had in the first instance exercised its right to make its inventory for the close of 1917 on cost prices which were lower than the market price, a considerable reduction would have been made in the tax assessed.

Upon the facts above stated the plaintiff makes an alternative claim. In event this court refuses to apply the principle of law involved in its claim for refund and holds that its inventories were improperly made, it asks that its inventory for the close of 1917 be made up on the basis of cost so far as shown by the evidence. The argument for defendant is in substance that the plaintiff having failed to make up its inventories in the manner lawfully required by the Treasury Decision and having filed its claim for a refund on a different basis, the commissioner was authorized to determine the manner of making the inventories. To this

the plaintiff answers that the commissioner did not follow the rule and regulation contained in the Treasury Decision and which had been promulgated by the bureau, and we think that if the plaintiff's contention on this point is correct the computation made by the commissioner must be revised.

It may be that when the taxpayer has not made up its inventories in accordance with the law and the regulations, after the commissioner has applied a method which does conform thereto, plaintiff can not object on the ground that it originally had the right to take some method more favorable to itself, but we do not find it necessary to decide this question. The Treasury Decision, which, as we have already said, had the force and effect of a regulation, provided that inventories should be taken on the basis of cost, or cost or market, whichever was lower. The meaning is not entirely clear, but we think it was intended that if cost was taken for the beginning of the year it should be taken also for the close and vice versa. Any other method through a series of years would produce most inconsistent results, for what would produce a loss one year might produce a gain another if a different method was taken. But we do not find it necessary to decide whether when cost is taken as the basis of the inventory for the beginning of the year it must also be taken as the basis at the end of the year. The Treasury Decision held that the inventory should be taken on the basis of cost or market, whichever was lower. In the instant case at the close of the year the cost was lower, and we think the plaintiff is entitled to have the regulation applied; in other words, that the bureau should conform to its own regulations, provided of course they were in accordance with the law.

If it be argued that its claim for refund was made on a different basis, the answer is that the difference was only in the method of calculating or computing the proper inventory. In its claim for refund plaintiff stated in substance that the inventories had not been properly adjusted and that the revenue agent erroneously added to the company's net income a certain sum representing adjustment of the inventory on open-hearth rails. Plaintiff claimed too much. But is this any reason why it should not now have the proper

amount, which was less? We think not. It appears to us there is no more reason why it may not be permitted to correct an error of this kind than a mathematical error as to which there would be no question.

It follows from what has been said above that the plaintiff is entitled to have its closing inventory for 1917 recomputed on the basis of cost so far as shown by the evidence.

Correcting the inventory to conform to actual costs, as stated in Finding VII, and making the other corrections in the computation of the tax made necessary by this change, we find that the tax was overpaid in the amount of $3,825.39 and that there was also an overpayment of interest of $379.75, making a total overpayment at the last date of $4,205.14, which, with interest from March 30, 1925, as provided by law, the plaintiff is entitled to recover. Judgment will be entered accordingly.

SINNOTT, *Judge*, and BOOTH, *Chief Justice*, concur.

GRAHAM, *Judge*, took no part in the decision of this case; and MOSS, *Judge*, took no part, because of illness.

C. L. MAGUIRE PETROLEUM CO., A CORPORATION OF CHICAGO, ILLINOIS, v. THE UNITED STATES

[No. H-374. Decided June 3, 1929]

On Demurrer to Petition

Statute of limitations; necessity of departmental action on claim.—Where a contract makes the decision of the Secretary of War, when he is petitioned by the contractor, final as to disputed matters, running of the statute of limitations, section 156 of the Judicial Code, is not postponed by a submission of such matters to the accounting officers of the Government instead.

The Reporter's statement of the case:

Mr. Louis R. Mehlinger, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the demurrer.

Mr. Thomas E. Lodge, opposed.

The material allegations are stated in the opinion.

BOOTH, *Chief Justice*, delivered the opinion of the court:

The defendant demurs to plaintiff's petition. The allegations of the petition assert a claim arising out of a contract to deliver to the United States 10,000 barrels of fuel oil at $4.09½ per barrel, the oil to be transported in contractor's tank cars f. o. b. Group Three, Oklahoma, consigned to Standard Oil Company of New Jersey, at Bayway, New Jersey, the plaintiff and the United States being obligated under the contract to equalize freight differentials.

On June 10, 1920, the plaintiff was advised of the immediate need of oil by the New York supply depot and requested by the Government officer in charge of the depot to secure if possible a trainload of such oil in transit from a point nearer destination than Group Three, Oklahoma. The plaintiff did secure a trainload of the oil needed, in transit, at Heath, Ohio, and the same was delivered at the point of destination set forth in the contract. In compliance with the urgent request of the defendant, plaintiff incurred an additional freight charge of $4,843.36, i. e., in securing the oil for immediate delivery, plaintiff was compelled to pay and did pay a freight equalization fee of $4,843.36. With respect to the amount and payment of the sum of $4,843.36 sued for, there is no dispute. The petition further alleges that the plaintiff's claim for $4,843.36 was disallowed by the Auditor for the War Department on November 1, 1920; that thereafter plaintiff was requested by the Quartermaster General, U. S. A., to submit its claim to the Comptroller of the Treasury, which was done, the comptroller approving the action of the Auditor for the War Department on April 12 1921; that thereafter, upon request, the claim was submitted to the Comptroller General, where it was finally disallowed on September 21, 1921, being thereafter presented to the President on May 9, 1923. The petition herein was filed September 21, 1927. The single issue is the statute of limitations. The plaintiff's petition was filed on the last day of the limitation period, for section 156 of the Judicial Code provides as follows:

"Every claim against the United States cognizable by the Court of Claims shall be forever barred unless the petition

setting forth a statement thereof is filed in the court * * * within six years after the claim first accrues."

The plaintiff relies upon paragraph 17 of the contract to toll the statute. If it is ineffectual for that purpose the suit is manifestly barred. Paragraph 17 reads as follows:

"17. *Adjustment of claims and disputes.*—Except as otherwise specifically provided in this contract, any claims, doubts, or disputes which may arise under this contract, or as to its performance or non-performance, and which are not disposed of by mutual agreement, may be determined, upon petition of the contractor, by the Secretary of War or his duly authorized representative or representatives. If the Secretary of War selects a board as his authorized representative to hear and determine any such claims, doubts, or disputes, the decision of the majority of said board shall be deemed to be the decision of the board. The decision of the Secretary of War or of such duly authorized representative or representatives shall be final and conclusive on all matters submitted for determination: *Provided*, That where the decision is rendered by such representative or representatives, the Secretary of War may, at his option, either upon his own motion or upon petition filed with him by the contractor within 20 days after notice of the decision of such duly authorized representative or representatives has been served upon him, review the action of such representative or representatives and render his decision thereon. Any sum or sums allowed to the contractor under the provisions of this article shall be paid by the United States as part of the cost of the articles or work herein contracted for and shall be deemed to be within the contemplation of this contract."

It is difficult to grasp the force of plaintiff's contention. In the first place, from the allegations of the petition, paragraph 17 of the contract was not observed. It is true the plaintiff's claim was disallowed by the Auditor for the War Department, but this naked allegation does not disclose a compliance with paragraph 17 of the contract. In addition to this pertinent fact is another obvious one; that is, that a decision of the Secretary of War, had one been invoked and given, was made by the contract final and conclusive. The statute of limitations is jurisdictional in this court, and the only possible escape from it herein would require a holding

that plaintiff's cause of action did not accrue until it had exhausted all the remedies prescribed in the contract for the adjustment of claims arising therefrom. This question has been so often before the court and so frequently determined adversely to the contention advanced that we think we need do no more than cite the very recent case of *Southern Pacific Company* v. *United States*, No. B-367, decided April 1, 1929 [67 C. Cls. 414]. To the same effect is *Atlantic Coast Line R. R. Co.* v. *United States*, No. E-92, decided January 7, 1929 [66 C. Cls. 576]. See also *Curtis* v. *United States*, 34 C. Cls. 1, 4.

The plaintiff is in fact and in law confronted with two obstacles: First, a failure to observe paragraph 17, and secondly, if the paragraph had been observed, the jurisdiction to adjust the claim was by the contract reposed exclusively in the War Department. See *Brinck, Receiver*, 53 C. Cls. 170, 177.

The demurrer will be sustained, and the petition dismissed. It is so ordered.

SINNOTT, *Judge;* and GREEN, *Judge*, concur.

GRAHAM, *Judge*, took no part in the decision of this case; and MOSS, *Judge*, took no part on account of illness.

EDGAR H. LATHAM v. THE UNITED STATES

[No. J-252. Decided June 3, 1929]

On the Proofs

Contracts; delay in preparatory work; authority to change time of completion.—Where a contract gives the contracting officer authority to make, by written order, any reasonable change in the provisions thereof, and due to delay in preparatory work the contracting officer notifies the contractor in writing that the time for completion of the contract will run from the time the preparatory work is completed, the notice is a valid change in the contract and fixes the period for performance.

The Reporter's statement of the case:

Messrs. George A. King and *George R. Shields* for the plaintiff. *King & King* were on the brief.

Mr. John E. Hoover, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff, Edgar H. Latham, is a resident of Columbus, Ohio, and is a citizen of the United States, trading and doing business under the name and style of "E. H. Latham & Company."

II. In response to a circular proposal No. 5–2799, dated January 5, 1927, the plaintiff submitted a bid for the complete erection of the steel work of the east eighteen bays of craneway at Wright Field, Dayton, Ohio.

On January 15, 1927, the bids of the competing contractors were opened and it was then found that the plaintiff had submitted the lowest price for the work to be done and an award of the contract was accordingly made to the plaintiff.

On February 4, 1927, a contract No. W 535 AC–630, was entered into between the plaintiff and the United States of America, represented by W. F. Volandt, captain, Air Corps, U. S. Army, acting by direction of the Chief of Air Corps and under the direction of the Secretary of War. A copy of the contract is attached to the plaintiff's petition, marked "Exhibit A," and is by reference made a part of this finding. A copy of the specifications forming a part of the contract is in evidence as plaintiff's Exhibit No. 1–A, and is likewise made a part of this finding by reference.

All of the structural steel and necessary rivets called for in the proper performance of the contract were to be furnished by the Government without cost to the contractor and delivered at the site of the proposed building. In Article I of the said contract it was provided that "within ninety (90) calendar days from the date of this contract" eighteen bays of craneway were to be erected "on foundations now under construction at Wright Field."

At the time of the submission of his bid for the work to be done, the plaintiff had no knowledge as to the then con-

dition of the foundations. He was tendered the contract on February 2, 1927, and on that date he examined the site of the work and ascertained that the foundations had not been built and that no work had been done thereon.

Before signing the contract the plaintiff conferred with Captain Volandt, the contracting officer, and was informed by him that his time would begin to run from the day the foundations were completed and ready for work to begin.

The plaintiff transmitted four signed copies of the contract to the contracting officer on February 4, 1927, and in the final paragraph of the letter of transmittal stated:

"We thank you very much for this contract and will keep in touch with the job so as to be ready to start the erection of the structural steel as soon as the foundations are ready."

It was not until February 7, 1927, that a contract was entered into between the United States and M. E. White Company, of Chicago, Illinois, for the excavation of the foundations and for the construction of the concrete footings upon which the bays of craneway were to be erected by the plaintiff. That contract called for the completion of the work to be done thereunder within forty-five calendar days from the date of that contract.

III. On April 4, 1927, a letter was written by Capt. W. F. Volandt to the plaintiff in regard to the contract in suit, paragraph two of which letter is as follows:

"2. The contract for foundation work will be finished on April 7, 1927, which date will be considered as the beginning of your ninety-day period."

The first sentence of Article III of the contract is as follows:

"The Government may by a written order to the contractor, signed by the contracting officer at any time during the performance of this contract, make reasonable changes in the drawings, specifications, conditions of delivery, and/or any other provisions in the contract."

IV. The plaintiff began work promptly after April 7, 1927, and completed it on June 22, 1927, or within less than ninety days.

Reporter's Statement of the Case

On completion of the work the contracting officer accepted the same and certified the work as complete and ready for payment. There was no question or dispute between the plaintiff and the contracting officer as to the manner or time of completion. The finance officer, however, in making payment, deducted and withheld the sum of $1,200 as for a delay of forty-eight days in completion, at the rate of $25.00 per day, which said deduction was made as liquidated damages under Article V of the contract.

The contractor, through the commanding officer, made claim for payment of the sum so withheld, and the General Accounting Office allowed a refund amounting to $350, but refused payment of the balance amounting to $850. In the comptroller's decision of November 18, 1927, it was stated that:

"Contractor Latham is entitled to an extension of time for fourteen days because of the delay from March 24 to April 7, 1927, of the White Company in completion of the work. He is not entitled to an extension of time for the balance of the delay amounting to thirty-four days."

V. Under date of November 30, 1927, Captain W. F. Volandt addressed another letter pertaining to the contract in suit to the plaintiff, as follows:

ISC—dew

WAR DEPARTMENT,
AIR CORPS, MATERIAL DEPARTMENT,
OFFICE OF THE CONTRACTING OFFICER,
Wright Field, Dayton, Ohio, November 30, 1927.

Subject: Contract W 535 AC–630.
To: E. H. Latham, 447 Neilston St., Columbus, Ohio.

1. Receipt is acknowledged of your letter of the 22d instant inclosing a draft of a letter to the Comptroller General relative to the disallowance of a part of your claim for reimbursement of deductions made as liquidated damages under the subject contract. Receipt is also acknowledged of your letter of the 26th instant inclosing a copy of the Comptroller's decision A–20497 relating to this matter. The draft of letter mentioned has been reviewed and your statements are concurred in by this office. It is returned, together with

copy of comptroller's decision, in accordance with your request for comments and suggestions before a letter is sent to the Comptroller General.

2. It is believed that the practical construction to be placed upon the terms of this contract and according to which the work was done should prevail over the literal meaning of the contract. The fact that contract W 535 AC–631, dated February 7, 1927, with M. E. White Co., for the excavation for foundations for the east 18 bays of craneway and the construction of concrete footings, which work was to be performed within 45 calendar days from the date of said contract, or on March 24, 1927, but not completed until April 7, 1927, clearly indicates that you could not commence the work under the terms of your contract until Contractor White had completed his work. This fact was so apparent that the contracting officer under date of April 4, 1927, advised you in writing that the foundation work under the M. E. White contract would be finished on April 7, 1927, which date would be considered as the beginning of your 90-day period under your contract. It is not believed that the contracting officer exceeded his authority in this respect since Article III of the subject contract provided that the Government may, by written order to the contractor, signed by the contracting officer, at any time during the performance of the contract make reasonable changes in the drawings, specifications, and conditions of delivery and/*or any other provision in the contract*. Accordingly, on April 7, 1927, you started shipment of the equipment to Wright Field for the erection of the craneway and completed said erection well within the ninety-day period stipulated in the contract. It is not believed that you should be considered responsible or be deemed to be in default since the cause was beyond your control and without your fault. It has often been held that where a contract provides for an extension of time due to certain specified causes, there is no authority in the contracting officer or any other administrative officer to grant additional time for other causes not named in the contract. However, Article VII of the subject contract provides for extension in time for performance for causes be-

yond the control and without the fault of the contractor, including delays caused to the contractor by the direct act or failure to act of the Government. The fact must not be overlooked that by your contract you charge yourself with an obligation to complete the work within ninety calendar days from the date thereof, which performance was rendered impossible by the failure of contractor White to complete his work prior to April 7, 1927. It may be held that your liability is created by an express promise that such impossibility does not as a general rule excuse performance, and that the event which has happened can be assumed to have been contemplated by the parties. However, since it was not contemplated, the minds apparently did not meet and it is believed that such event should operate as a discharge of the liability.

3. Your action in requesting the Comptroller General of the United States for a review of his decision is concurred in by this office and in case the view is adverse, you still have the remedy of a suit in the Court of Claims.

(Signed) W. F. VOLANDT,
Captain, Air Corps,
Contracting Officer.

Incl.:
Let. Comp. Gen.
Decision.

VI. Article VII of the contract of February 4, 1927, is in part as follows:

"The contractor shall not be responsible for, or be deemed to be in default hereunder by reason of delays in the performance of this contract caused by strikes, fires, explosions, riots, acts of God, failure of transportation, or other causes beyond the control and without the fault of the contractor, including delays caused to the contractor by the direct act or failure to act of the Government, and the contractor's time for performance of this contract shall hereby be extended to cover the delay in performance so caused to the contractor; provided that the contractor shall have immediately and fully notified the contracting officer of any such cause of delay, and shall have used his best efforts promptly to remove the same, and to obviate the effects thereof; and provided further, that such a delay shall not have been due

to the contractor's failure to comply with any of the provisions of this contract. The contractor shall proceed with the performance of this contract as soon as and to the extent that any such cause of delay shall have been removed."

VII. The work required to be done by the plaintiff under the contract could have been done in either of two ways. One method was by assembling and riveting together as the work progressed the various members which comprised the structures in their completed forms. That method was the one adopted by the plaintiff and used by him in the performance of his contract. Under that method no work could be done until the foundations had been poured and had become sufficiently hardened to receive the steel structures to be superimposed upon them.

Under another method of performing the work the members could have been assembled and riveted together on the ground and then placed in position on the foundations through the use of a ten-ton whirley.

Had that latter method been adopted and used by the plaintiff in the prosecution of his work, the drilling and necessary reaming of rivet holes and the making of connections between steel furnished by the Morgan Engineering Company and that furnished by the United States Government, and other work incident to the putting together of the steel structures could have been done before the foundations were completed and a substantial saving of time could thereby have been effected.

It appears that neither during the progress of the work nor after its final completion did the contracting officer find fault either with the method used or with the time consumed by the plaintiff in the performance of his contract. Upon the completion of the work the contracting officer certified the account of the plaintiff for full and final payment.

The court decided that plaintiff was entitled to recover.

SINNOTT, *Judge*, delivered the opinion of the court:

On the 4th day of February, 1927, plaintiff entered into a contract with the United States, represented by Captain W. F. Volandt as contracting officer, whereby plaintiff un-

dertook to erect within 90 calendar days from said date eighteen bays of craneway " on foundations now under construction at Wright Field," Dayton, Ohio. At the time of the submission of his bid for the work to be done the plaintiff had no knowledge as to the then condition of the foundation.

He was tendered the contract on February 2, 1927, and on that date he examined the site of the work and ascertained that the foundations had not been built and that no work had been done thereon. Before signing the contract the plaintiff conferred with Captain Volandt, the contracting officer, and was informed by him that his time would begin to run from the date the foundations were completed and ready for work to begin.

The plaintiff transmitted four signed copies of the contract to the contracting officer on February 4, 1927, and in the final paragraph of the letter of transmittal stated:

"We thank you very much for this contract and will keep in touch with the job so as to be ready to start the erection of the structural steel as soon as the foundations are ready."

It was not until February 7, 1927, that a contract was entered into between the United States and M. E. White Company, of Chicago, Illinois, for the excavation of the foundations and for the construction of the concrete footings upon which the bays of craneway were to be erected by the plaintiff. That contract called for the completion of the work to be done thereunder within forty-five calendar days from the date of that contract.

On April 4, 1927, a letter was written by Captain W. F. Volandt, the contracting officer, to the plaintiff in regard to the contract in question, paragraph 2 of which letter is as follows:

"2. The contract for foundation work will be finished on April 7, 1927, which date will be considered as the beginning of your ninety-day period."

The plaintiff began work promptly after April 7, 1927, and completed the same on June 22, 1927, or within less than 90 days.

On completion of the work the contracting officer accepted the same and certified the work as complete and ready for

payment. There was no question or dispute between the plaintiff and the contracting officer as to the manner or time of completion. The finance officer, however, in making payment deducted and withheld the sum of $1,200 as for a delay of 48 days in completion at the rate of $25 per day, which deduction was made as liquidated damages under Article V of the contract.

The contractor, through the commanding officer, made claim for payment of the sum so withheld, and the General Accounting Office allowed a refund amounting to $350, but refused payment of the balance, amounting to $850, the amount sued for herein.

We see no justification for withholding this amount from plaintiff. The first sentence of Article III of the contract is as follows:

"The Government may by a written order to the contractor, signed by the contracting officer at any time during the performance of this contract, make reasonable changes in the drawings, specifications, conditions of delivery, and/or any other provisions in this contract."

The contracting officer, Captain W. F. Volandt, as is shown in Finding III, notified the plaintiff in writing that the foundation work would be finished on April 7, 1927, and that that date would be considered as the beginning of the 90-day period. In pursuance of said notice the plaintiff promptly began work and completed it on June 22, 1927, within less than 90 days.

Judgment should be awarded in favor of plaintiff. It is so ordered.

GREEN, *Judge*, and BOOTH, *Chief Justice*, concur.

GRAHAM, *Judge*, took no part in the decision of this case; and MOSS, *Judge*, took no part, on account of illness.

DANIEL C. REYNER v. THE UNITED STATES

[No. E-599. Decided June 3, 1929]

On the Proofs

Navy pay; commutation of quarters, heat, and light; dependency of parent; act of May 26, 1926.—Where an officer of the Navy fails to establish facts showing dependency of his parent, that he maintained a place of abode for him, or what, if anything, he contributed toward his support, he is not entitled to the relief provided in the act of May 26, 1926, for payments made in good faith for quarters, heat, and light.

The Reporter's statement of the case:

Mr. George A. King for the plaintiff. *Mr. Cornelius H. Bull* and *King & King* were on the brief.

Mr. M. C. Masterson, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. From September 9, 1919, and prior thereto until March 25, 1925, plaintiff was an officer of the United States Navy serving on active duty.

II. Plaintiff's father, Bernard Reyner, was born in 1876, and was therefore between 43 and 45 years of age during the period covered by the claim. He was married in 1890, and his (first) wife died on July 6, 1916. He remarried about one year after his first wife's death. His second wife is still living, and has lived with him ever since their marriage. He is a watchmaker by trade, and conducted a business of repairing watches, from which he received a small income. He owned no real estate or other property. He had some bronchial trouble, but his general health was not such as to incapacitate him for business or prevent him from earning a living.

III. Plaintiff's father had five children living during the period of the claim, four sons besides the plaintiff, three of whom were married and gainfully employed or in business. The youngest son, then a minor, was unemployed.

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To what extent the father received contributions from his children is not clearly shown by the record. The plaintiff did not arrange for a place of abode for his father, and the evidence does not satisfactorily show how much, if anything, he contributed toward his father's support.

IV. Under date of December 23, 1924, plaintiff tendered his resignation as a naval officer to the President, but by letter dated January 10, 1925, was informed by the Bureau of Navigation that in view of statements contained in a letter to that Bureau from the Bureau of Supplies and Accounts he was in debt to the United States in the sum of $1,577.01 and that his resignation would not be acted upon until such indebtedness had been canceled.

V. Upon refusal of the Navy Department to accept his resignation, plaintiff refunded to the United States the sum of $1,332.23, under date of January 22, 1925, protesting the validity of the Government's claim.

On the same date the Comptroller General addressed a letter to the Chief of the Bureau of Navigation to the effect that plaintiff had submitted evidence showing that he was entitled to $244.68 and had refunded the balance of $1,332.23, closing his account.

Under date of January 24, 1925, the Secretary of the Navy notified plaintiff that by direction of the President, his resignation as an officer in the United States Navy, tendered by letter of December 23, 1924, was accepted to take effect March 29, 1925.

The court decided that plaintiff was not entitled to recover.

GRAHAM, *Judge*, delivered the opinion of the court:

This is a claim for commutation of quarters, heat, and light for the period from October 1, 1919, to September 5, 1921. The sum of $1,332.23 was originally allowed and paid the plaintiff on this account, and was afterwards disallowed by the comptroller. Plaintiff is suing to recover this amount.

The applicable statutes are as follows:

"That during the present emergency every commissioned officer of the Army of the United States on duty in the field, or on active duty without the territorial jurisdiction of the

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United States, who maintains a place of abode for a wife, child, or dependent parents, shall be furnished at the place where he maintains such place of abode, without regard to personal quarters furnished him elsewhere, the number of rooms prescribed by the act of March second, nineteen hundred and seven (Thirty-fourth Statutes, page eleven hundred and sixty-nine), to be occupied by, and only so long as occupied by, said wife, child, or dependent parent; and in case such quarters are not available every such commissioned officer shall be paid commutation thereof and commutation for heat and light at the rate authorized by law in cases where public quarters are not available; but nothing in this act shall be so construed as to reduce the allowances now authorized by law for any person in the Army." (Act of April 16, 1918, 40 Stat. 530.)

* * * * * * *

"That the Comptroller General of the United States is hereby authorized and directed to allow credit in the accounts of disbursing officers for payments of commutation of quarters, heat, and light under the act approved April 16, 1918 (Fortieth Statutes, page 530), because of a dependent parent, and as rental and subsistence allowance under the act of June 10, 1922 (Forty-second Statutes, page 625), because of a dependent mother, made in good faith by disbursing officers prior to July 1, 1923: *Provided*, That where the payee responded to a needy family condition in an amount at least equal to the allowances obtained by him no collection shall be made on account of payment of the allowances to him prior to July 1, 1923; and amounts heretofore collected as refund of the allowances obtained in such cases prior to July 1, 1923, notwithstanding the protest of the payee, either by stoppage of pay, payment in cash, allotment of pay, or offset, shall be refunded; but this proviso shall not be applicable where the payee has admitted there was no dependency on him, or where he has refused to furnish evidence of the dependency, or where the payee has voluntarily refunded the payments in whole or in part, or has submitted no claim for the allowances in the nature of a protest against offset of his pay as refund of the payments." (Act of May 26, 1926, 44 Stat. 654.)

The facts do not show the dependence of his father on the plaintiff nor the payment of an amount equal to the allowance obtained on account of an alleged "needy family condition." His father was between 43 and 45 years of age. He was not incapacitated for work or business, and in fact carried on a business for a portion of the time. He was a

watchmaker, and conducted the business of repairing watches, from which he received a small income. He remarried a year after his wife's death and his second wife was living when this suit was brought, and has lived with him since their marriage. Plaintiff's father had five children living during the period of this claim, four sons besides the plaintiff, three of whom were gainfully employed or in business. The youngest son, then a minor, was unemployed. It does not appear to what extent the father received assistance from the other children.

The plaintiff did not arrange for a place of abode for his father, and the findings do not show satisfactorily what, if anything, he contributed toward his father's support.

The petition should be dismissed, and it is so ordered.

SINNOTT, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

MOSS, *Judge*, took no part in the decision of this case because of illness.

SIMPSON R. STRIBLING v. THE UNITED STATES

[No. F-308. Decided June 3, 1929]

On the Proofs

Army pay; aviation duty; proof officer, bomb tests.—An officer of the Army, acting as a proof officer in bomb tests, announced as on duty involving regular and frequent aerial flights, and making such flights, is entitled to the increase in pay for aviation duty, section 13a, act of June 4, 1920.

The Reporter's statement of the case:

Mr. S. T. Ansell for the plaintiff.

Mr. M. C. Masterson, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff, Simpson R. Stribling, has had the following service in the United States Army:

Second lieutenant, Coast Artillery Corps, August 9, 1917.

Accepted, Coast Artillery Corps, August 28, 1917.
First lieutenant, Coast Artillery Corps, August 9, 1917.
Captain (temporary), Coast Artillery Corps, March 6, 1918.
Captain (temporary), Coast Artillery Corps, September 2, 1919.
Honorably discharged as captain (temporary), June 9, 1920.
Transferred, Ordnance Department, July 1, 1920.
Captain, July 1, 1920.

II. Plaintiff was stationed, during the period in question, at the Aberdeen Proving Ground, Maryland, as chief of bomb section, proof department, and had charge of the testing of bombs and bomb components for lighter-than-air and heavier-than-air craft.

III. On July 30, 1920, plaintiff received Special Orders, No. 178–0 (paragraph 19, War Department, date July 30, 1920), stating First Lieutenant Simpson R. Stribling, Ordnance Department, was announced as on duty involving regular and frequent aerial flight.

IV. During the period December, 1921, January–June, 1922, inclusive, plaintiff acted as proof officer in the case of bomb tests at this station, bombs being dropped on the following dates:

1921: December 6, 7, 8, 16, and 27.

1922: January 3, 9, 10, 14, and 25; February 3, 28; March 1, 3, 6, 17, and 23; April 5, 6, 7, 10, 11, 13, 18, 20, 21, 24, 25, 27; May 8, 9, 15, 16, 22, 23, 26, 31; June 12, 15, 17, 19, 20, 23, 27.

V. A recapitulation of the foregoing shows the plaintiff performed as proof officer five bomb tests during the month of December, 1921; five bomb tests during January, 1922; two in February, five in March, twelve during April, eight during May, and seven in June. During the above period the proof officer usually participated in flights made for such purposes. That rule, however, was not an invariable one.

VI. During each of the months involved in this suit (December, 1921–June, 1922) plaintiff participated in aerial flights in the performance of his duties as proof

officer. The number of flights made each month during said period in heavier-than-air craft or the number of hours flown in lighter-than-air craft were sufficient under the regulations relating to extra pay for flying to entitle an officer to such extra pay.

VII. The plaintiff received flying pay, representing fifty per cent additional pay prior to December, 1921, and after June, 1922.

VIII. Plaintiff did not receive during the period December, 1921, to June, 1922, inclusive, flying pay representing fifty per cent additional pay for flying during the above time. If entitled to 50 per cent additional pay for flying during this period, there would be due plaintiff $700.00.

The court decided that plaintiff was entitled to recover.

GRAHAM, *Judge*, delivered the opinion of the court:

This is a claim of an Army officer who was assigned on July 30, 1920, to duty "involving regular and frequent aerial flights," and from December, 1921, to January, 1922, the period for which increased pay is claimed in this suit, performed duty involving regular and frequent aerial flights.

The act of June 4, 1920, 41 Stat. 769, provides that "Officers and enlisted men of the Army shall receive an increase of 50 per centum of their pay while on duty requiring them to participate regularly and frequently in aerial flights."

It is clear that this case is ruled by the decision of this court particularly in *Levy Johnson* v. *United States*, H–54, decided March 18, 1929 [67 C. Cls. 318], and also the cases of *Culver* v. *United States*, 60 C. Cls. 825, 271 U. S. 315, and *Bradshaw* v. *United States*, 62 C. Cls. 638. See also in the same connection *Luskey* v. *United States*, 56 C. Cls. 411, 262 U. S. 62; and *Clark* v. *United States*, 60 C. Cls. 589.

The plaintiff is entitled to recover $700, the amount claimed in the petition, and it is so ordered.

SINNOTT, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

MOSS, *Judge*, took no part in the decision of this case because of illness.

A. W. FUCHS v. THE UNITED STATES

[No. H-418. Decided June 3, 1929]

On the Proofs

Per diem in lieu of subsistence; necessity of evidence as to actual expenditures.—A regulation of the Secretary of the Treasury, regularly made pursuant to section 13 of the act of August 1, 1914, prescribing the per diems in lieu of subsistence to be paid employees engaged in field work, had the force of law, and applied to an employee absent from headquarters on public business, notwithstanding absence of evidence as to actual expense for subsistence.

The Reporter's statement of the case:

Mr. Guy Mason for the plaintiff. *Mason, Spalding & McAtee* were on the brief.

Mr. M. C. Masterson, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff is a citizen of the United States and a resident of the State of Maryland. At the time the suit was filed he had been for more than ten years an employee of the United States Government, being attached to the Public Health Service, a bureau or department of the Treasury Department, and was immediately under the direction and supervision of the Surgeon General of the Public Health Service as an assistant sanitary engineer.

II. For a number of years the Public Health Service, under authority of Congress, has conducted field investigations of malaria—studies of the causes of malaria, of the types of mosquitoes which are held by sanitary experts as carriers of malaria, the breeding places of malaria-carrying mosquitoes, and of the breeding of these types of mosquitoes. These studies or investigations are carried on under authority of Congress in conjunction with the authorities of the several States. Congress annually makes appropriations for the work. Surgeons of the Public Health Service are in charge of the work. They have trained assistants,

such as sanitary engineers, assistant sanitary engineers, nurses, clerks, and laborers. In conducting investigations of this character a field headquarters—that is, a central office—is established at some point from where it is comparatively easy to get to the mosquito-breeding place, and still be where help, facilities, and fairly decent living conditions may be obtained and had. This form or system of operation, in use for a number of years, necessitates those engaged in the work making trips back and forth between the field headquarters and the mosquito-breeding places, which may be drainage ditches or swamps. When the work is not too distant from headquarters those actually engaged in the investigations in the field go out in the morning and return in the evening. In the instant case plaintiff left his field headquarters daily in the morning and returned in the evening.

Inasmuch as the investigations usually are made in out-of-the-way places, necessitating the investigators being actually away from the town or city in which headquarters are located, often in other counties, even other States, the Surgeon General, Public Health Service, issued such orders pursuant to Travel Regulations, Treasury Department Circular No. 127, of March 29, 1922, as would give to those actually engaged in making the investigations travel pay and subsistence, or a per diem in lieu of subsistence, when away from field headquarters on public business.

III. On July 1, 1924, the plaintiff was on duty, as an associate sanitary engineer, Public Health Service, at Memphis, Tennessee, to which point he had gone under orders from his superior officers, dated October 18, 1920. He was in charge of cooperative malaria control work in the State of Tennessee. Under the aforesaid date of July 1, 1924, plaintiff received orders from his superior officer, L. D. Fricke, surgeon, United States Public Health Service, medical officer in charge, directing him to proceed to points in Gibson, Obion, and Shelby Counties, Tennessee, and Dunklin and New Madrid Counties, Missouri, from time to time, for the purpose of studying the malaria problems in those counties. He received orders, also, from the same superior officer, under the same date, to continue the study of major drain-

age in relation to malaria in the delta regions of Arkansas, Mississippi, and Tennessee during the fiscal year beginning July 1, 1924.

The aforesaid orders continued plaintiff's headquarters at Memphis, Tennessee, and stated that while he, plaintiff, was absent from his headquarters and on such investigations and studies, he would be entitled to an allowance of $4 per diem in lieu of subsistence, together with actual and necessary transportation expense, as provided in bureau orders addressed to the medical officer in charge under date of June 27, 1924.

In the course of the performance of his duties the plaintiff, between the hours and the on the dates hereinafter set forth, was absent from his official station on public business.

Days and hours plaintiff was absent from his official headquarters on public business:

1924

July 8. Left Memphis, Tenn., at 9 a. m. (by auto to Crittenden County, Ark.). Returned to Memphis, Tenn., at 4 p. m.

9. Left Memphis, Tenn., at 9.30 a. m. (by auto to Kerrville, Tenn.). Returned to Memphis, Tenn., at 4.30 p. m.

10. Left Memphis, Tenn., at 9 a. m. (by auto to Crittenden County, Ark.). Returned to Memphis, Tenn., at 4.30 p. m.

23. Left Memphis, Tenn., at 9.30 a. m. (to Crittenden County, Ark.). Returned to Memphis, Tenn., at 4 p. m.

29. Left Memphis, Tenn., at 9 a. m. (by auto to Crittenden County, Ark.). Returned to Memphis, Tenn., at 4.30 p. m.

Aug. 5. Left Memphis, Tenn., at 10 a. m. (by auto to Crittenden County, Ark.). Returned to Memphis, Tenn., at 5 p. m.

7. Left Memphis, Tenn., at 9 a. m. (by auto to Crittenden County, Ark.). Returned to Memphis, Tenn., at 4 p. m.

1924

Aug. 8. Left Memphis, Tenn., at 9 a. m. (by auto to Crittenden County, Ark.). Returned to Memphis, Tenn., at 4.30 p. m.

13. Left Memphis, Tenn., at 9 a. m. (by auto to Crittenden County, Ark.). Returned to Memphis, Tenn., at 5 p. m.

15. Left Memphis, Tenn., at 9 a. m. (by auto to Crittenden County, Ark.). Returned to Memphis, Tenn., at 5 p. m.

26. Left Memphis, Tenn., at 9 a. m. (by auto to Crittenden County, Ark.). Returned to Memphis, Tenn., at 4 p. m.

Sept. 9. Left Memphis, Tenn., at 9 a. m. (to Crittenden County, Ark.). Returned to Memphis, Tenn., at 4.30 p. m.

11. Left Memphis, Tenn., at 8 a. m. Returned to Memphis, Tenn., at 4.30 p. m. (to Collierville, Bailey and Germantown, Tenn.).

12. Left Memphis, Tenn., at 8.30 a. m. (by auto to Cordova, Bartlett, Tenn.). Returned to Memphis, Tenn., at 4.30 p. m.

16. Left Memphis, Tenn., at 9 a. m. Returned to Memphis, Tenn., at 4 p. m. (to Millington and Locks, Tenn.).

17. Left Memphis, Tenn., at 9 a. m. (by auto to Capleville and Whitehaven, Tenn.). Returned to Memphis, Tenn., at 4 p. m.

23. Left Memphis, Tenn., at 9 a. m. (by auto to Crittenden County, Ark.). Returned to Memphis, Tenn., at 4.30 p. m.

26. Left Memphis, Tenn., at 9 a. m. (by auto to Crittenden County, Ark.). Returned to Memphis, Tenn., at 4 p. m.

In due time the plaintiff submitted, through proper official channels, a statement showing the time and dates on which he was away, as stated aforesaid, on official business, and submitted vouchers for the same, duly approved, in the amount of $54, which was at the rate of $3 per day, the

amount claimed under the aforesaid regulations as the per diem when the time absent was less than a full day, and the disbursing officer of the Treasury Department paid the plaintiff the said sum claimed, namely, $54.

In addition to the sum of $54 paid as per diem allowance for subsistence, the plaintiff was also reimbursed for the actual cost of transportation involved, including reimbursement for gas and oil for automobile, bridge tolls, etc., and has never been called upon to refund or pay back said sums representing the actual cost of transportation.

IV. Several months after plaintiff had received the said sum of $54 from the said disbursing officer of the Treasury Department, the Comptroller General of the United States notified the said disbursing officer, who paid plaintiff the said sum of $54, that payment of said sum was not authorized by law for the reason that since plaintiff was not absent from his station for such periods during the days involved as would ordinarily and necessarily cause him to incur expenses for subsistence in addition to such expenses therefor as would have been incurred had he remained at his official station, he was not in a travel status within the meaning of the laws authorizing reimbursement of subsistence or per diem in lieu thereof.

In the month of October, 1926, the Surgeon General, Public Health Service, upon direction of the Comptroller General, demanded of plaintiff a refund to the United States of the sum of $54, which had been paid him as aforesaid as per diems while he was absent from the city of Memphis in the study of the malaria-carrying mosquito in the latter's lair. Upon receipt of said notice and order from the said Comptroller General, the Secretary of the Treasury, plaintiff's superior officer, protested to said Comptroller General against the latter's ruling, and requested a contrary ruling, which said Comptroller General declined to make.

The plaintiff on, to wit, the 7th day of April, 1926, forwarded to the disbursing officer, United States Treasury, a certified check in the amount of $54, as a refund of said per diems paid him by said disbursing officer. Said certified check forwarded by plaintiff was marked "paid under protest."

V. The payment to plaintiff as originally made was claimed under section 1 of the act of Congress of April 6, 1914 (38 Stat. 318); section 13 of the act of Congress of August 1, 1914 (38 Stat. 680), and certain regulations promulgated and letters of authorization written by proper officers of the Treasury Department.

Travel Regulations, Treasury Department Circular No. 127, of March 29, 1922, issued under the direction of the Secretary of the Treasury, are made a part hereof as though incorporated herein.

VI. The plaintiff, through his counsel, in due time filed a petition with the said Comptroller General for a reconsideration of the said Comptroller General's ruling depriving plaintiff of the aforesaid per diems aggregating $54, but said Comptroller General declined and refused to reconsider his ruling.

The court decided that plaintiff was entitled to recover.

MEMORANDUM BY THE COURT

The single question in this case is: Under the law, is the plaintiff entitled to subsistence? The act of April 6, 1914 (38 Stat. 318), reads as follows:

"On and after July first, nineteen hundred and fourteen, unless otherwise expressly provided by law, no officer or employee of the United States shall be allowed or paid any sum in excess of expenses actually incurred for subsistence while traveling on duty outside of the District of Columbia and away from his designated post of duty, nor any sum for such expenses actually incurred in excess of $5 per day; * * *."

Section 13 of the act of August 1, 1914 (38 Stat. 680), provides as follows:

"That the heads of executive departments and other Government establishments are authorized to prescribe per diem rates of allowance not exceeding $4 in lieu of subsistence to persons engaged in field work or traveling on official business outside of the District of Columbia and away from their designated posts of duty when not otherwise fixed by law * * *."

The Secretary of the Treasury, in pursuance of the foregoing authorization, promulgated the following regulations:

"(14) In case absence from official station involves part of a day the per diem for that day shall be as follows:

"(a) No per diem will be allowed when such absence is for three hours or less.

"(b) A per diem of $2 will be allowed when such absence is for more than three and not more than six hours.

"(c) A per diem of $3 will be allowed when such absence is for more than 6 hours and not more than 12 hours.

"(d) A per diem of $4 will be allowed when the absence is for more than 12 hours.

"(e) The calendar day will be the unit."

The regulations had the force of law. *United States* v. *Morehead*, 243 U. S. 607; *United States* v. *Smull*, 236 U. S. 405, 411. See also *Ward* v. *United States*, 60 C. Cls. 1002.

The plaintiff under the stipulated facts comes within the statute and the regulations and is entitled to a judgment for $54. It is so ordered.

CLINTON E. JOHNSON v. THE UNITED STATES

[No. J-650. Decided June 3, 1929]

On Demurrer to Petition

Tenure of office; civil-service railway postal employee; discharge; laches.—Plaintiff, a civil-service railway postal employee, discharged from the service in March, 1920, in pursuance of charges preferred against him, and whose petition was filed November 1, 1928, *held* barred from recovery by lapse of time.

The Reporter's statement of the case:

Mr. M. C. Masterson, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the demurrer.

Plaintiff *in propria persona*, opposed.

The material averments of the petition are stated in the following

MEMORANDUM BY THE COURT

Defendant demurs to plaintiff's petition. The essential allegations of the petition disclose the following facts:

The plaintiff was from March, 1902, until March, 1920, a civil-service railway postal employee. In March, 1920, he was discharged from the service in pursuance of certain charges preferred against him by the Chief Clerk of the Railway Mail Service. The plaintiff was duly notified of the charges and made written answer thereto. The gravamen of the complaint consists of allegations refuting the charges made and a failure to extend the plaintiff a hearing thereon. Aside from the fact of positive allegations disclosing a notice of the charges and an opportunity to answer the same it is plain from the petition that plaintiff's right of action is barred by lapse of time. *Nicholas* v. *United States*, 257 U. S. 71, 76; *United States ex rel. Arant* v. *Lane*, 249 U. S. 367; *Norris* v. *United States*, 257 U. S. 77; *Chamberlain* v. *United States*, 66 C. Cls. 317.

The demurrer is sustained and the petition dismissed. It is so ordered.

SOUTHERN PACIFIC CO. v. THE UNITED STATES

[No. E-352. Decided June 10, 1929]

On the Proofs

Special jurisdictional act of May 26, 1924; closing and controlling break in Colorado River.—Judgment given, under the special jurisdictional act of May 26, 1924, for the cost to the plaintiff and amounts expended by it in closing and controlling the break in the Colorado River.

The Reporter's statement of the case:

Mr. Isidore B. Dockweiler for the plaintiff.

Mr. Heber H. Rice, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. Dan M. Jackson* was on the brief.

The court made special findings of fact, as follows:

I. The Southern Pacific Company, plaintiff herein, is now, and was at all the times hereinafter mentioned, a corporation duly organized and existing under the laws of the State of Kentucky, with its principal place of business at An-

chorage, in the said State of Kentucky; and is now, and was during all of the times hereinafter mentioned, doing business in the States of California and Arizona.

II. The plaintiff, Southern Pacific Company, a corporation, is the same Southern Pacific Company mentioned and referred to in the act of Congress, entitled, "An act to confer jurisdiction upon the Court of Claims to ascertain the cost to the Southern Pacific Company, a corporation, and the amounts expended by it from December 1, 1906, to November 30, 1907, in closing and controlling the break in the Colorado River, and to render judgment therefor, as herein provided," and approved May 26, 1924. (See Chap. 192, U. S. Statutes L., vol. 43, part 1, Pub. Laws, p. 171.)

This suit is brought under the provisions of said act of Congress, a copy of which act is fully set out in paragraph two of plaintiff's amended petition filed herein, and is made a part hereof by reference.

III. The amount actually expended and the actual costs incurred by the Southern Pacific Company, plaintiff herein, in closing and controlling the break in the Colorado River within the period from December 1, 1906, to November 30, 1907, including pay-roll labor, material and supplies, freight, construction of levees, duties paid Mexican Government, payrolls officers and clerks, office expenses, traveling expenses, commissary supplies, transportation of men, trackage, rental of steamers, rental of locomotives, rental of freight-train cars, rental of roadway tools, rental of work equipment, maintenance of equipment, freight assessed contractors, and handling charges was the sum of $1,197,255.65.

Plaintiff has not been reimbursed any part of the amount of money expended or costs incurred in the closing of the break in the Colorado River.

IV. The land belonging at the time to the Southern Pacific Company, or any subsidiary corporation of said Southern Pacific Company, saved by the controlling of said break comprised 307,219 acres. Other land belonging at the time to the United States Government, and occupants and settlers, exclusive of railroad holdings, and the holdings of any subsidiary corporation of the Southern Pacific Company saved

by the closing and controlling of said break comprised 906,591.35 acres.

The proportion of the amount of land belonging at the time to the Southern Pacific Company and to any subsidiary corporation of the Southern Pacific Company which was saved by the closing and controlling of said break was 25.3105 per cent of the whole amount of land saved, and the proportion of the amount of the other land belonging at the time to the United States Government, and occupants and settlers, exclusive of railroad holdings, which was saved by the closing and controlling of said break was 74.6895 per cent of the whole amount of land saved.

V. The probable value of the land, improvements thereon, and other property belonging at the time to the Southern Pacific Company or any subsidiary corporation of said Southern Pacific Company, saved by the closing and controlling of said break, was $2,954,839.93. The probable value of the other land, improvements thereon, and other property belonging at the time to the United States Government, and occupants and settlers, exclusive of railroad holdings and holdings of any subsidiary corporation of the Southern Pacific Company, saved by the closing and controlling of said break, was $16,209,974.30.

The proportion of the probable value of the land, improvements thereon, and other property belonging at the time to the Southern Pacific Company or any subsidiary corporation of the Southern Pacific Company, saved by the closing and controlling of said break, was 15.4178 per cent of the whole amount of the probable value of all land and improvements thereon which were saved.

The proportion of the probable value of other land, improvements, and other property belonging at the time to the United States Government and occupants and settlers, exclusive of railroad holdings and holdings of any subsidiary corporation of the Southern Pacific Company, saved by the closing and controlling of said break, was 84.5822 per cent of the whole amount of the probable value of all lands and improvements thereon which were saved.

VI. The proportion of the sum of $1,197,255.65, the same representing the amount expended and costs incurred by the Southern Pacific Company in the closing and controlling of the break in the Colorado River, which is fair and reasonable to be deducted as the Southern Pacific Company's share of such expenditures and costs and the share of any subsidiary corporation of the Southern Pacific Company is 15.4178 per cent of the aforesaid sum of $1,197,255.65, which percentage amounts to the sum of $184,590.48. Deducting this amount from the total sum of $1,197,255.65 leaves a balance of $1,012,665.17.

The court decided that plaintiff was entitled to recover, in part.

SINNOTT, *Judge*, delivered the opinion of the court:

This case was referred to the Court of Claims by the act of Congress of May 26, 1924, 43 Stat. 171, which is as follows:

"An act to confer jurisdiction upon the Court of Claims to ascertain the cost to the Southern Pacific Company, a corporation, and the amounts expended by it from December 1, 1906, to November 30, 1907, in closing and controlling the break in the Colorado River, and to render judgment therefor, as herein provided.

"Whereas at the request of President Roosevelt, and under the stress of great emergency, from December 1, 1906, to November 30, 1907, the Southern Pacific Company closed and controlled the break in the Colorado River and thereby prevented the overflow and destruction of one million two hundred and fourteen thousand acres of irrigable land in the Imperial Valley in southern California, and saved to the Government the Laguna Dam and the Yuma reclamation project connected therewith in Arizona, as well as thousands of acres of other Government land along the Colorado River:

"Therefore

"*Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled*, That the claim of the Southern Pacific Company, a corporation, against the United States for reimbursement and repayment to such company of the cost of said company and the amounts expended by it from December 1, 1906, to November 30, 1907, in closing and controlling the break in the Colorado River, be, and such claim is hereby, referred to the Court of Claims, and full jurisdiction is hereby vested in

said court to ascertain the amounts actually expended and the actual costs incurred by the said Southern Pacific Company in closing and controlling said break within said period and to render judgment in favor of said Southern Pacific Company and against the United States of America for such aggregate amounts, less such proportion of such expenditures and cost as would be fair and reasonable to be deducted as said company's share of such expenditures and costs and the share of any subsidiary corporation of said Southern Pacific Company, because of the amount and probable value of the land and improvements thereon belonging at the time to said company, or any subsidiary corporation of said Southern Pacific Company, and which in the opinion of said court were saved by the closing and controlling of said break, as compared with the amount and probable value of the other land, improvements, and other property belonging at the time to the United States Government and occupants and settlers, and exclusive of railroad holdings, and holdings of any subsidiary corporation of said Southern Pacific Company, which, in the opinion of said court, were also saved by the closing and controlling of said break; with the right of appeal to both parties, and no statute of limitations shall apply to the right of recovery by said claimant. In ascertaining and determining aforesaid costs, expenses, facts, and matters, the court may receive and consider all papers, depositions, records, correspondence, and documents heretofore at any time filed in Congress, or with committees thereof, and in the executive departments of the Government, together with any other evidence offered."

The reasons for referring the present case to the Court of Claims are set forth in the preamble of the above act of Congress. The findings of fact made in accordance with said act leave little for comment, except we may say that, considering the complicated issues of fact involved, the magnitude of the work performed and the large expenditures made therefor by plaintiff, it is notable that there is not a greater difference in the amount of the judgment contended for by plaintiff and defendant.

Plaintiff contends in its brief for $1,059,957.42. The defendant concedes in its brief the sum of $867,515.43, chargeable to the Government, if overhead expenses are properly allowable under the act, which it contends should not be greater than the sum of $38,077.31.

We have allowed overhead expense in the sum of $105,-964.55, or $67,887.24 more than the defendant's figures, so that our total judgment of $1,012,665.17 is $145,149.74 more than the defendant concedes is due plaintiff in case overhead expenses are allowed.

We believe that judgment herein, and without interest under the act of Congress, is a tardy recognition of and reimbursement for a great work performed, and large expenditures made over twenty years ago at the request of President Roosevelt, which resulted in the saving from destruction of an immense acreage of land in the Imperial Valley, in southern California, and saved to the Government the Laguna Dam and Yuma reclamation project connected therewith in Arizona, as well as thousands of acres of other Government land along the Colorado River, as is stated in the preamble of the above act and as is set forth in the findings of fact, aggregating $16,209,974.30 in value.

Judgment should be awarded plaintiff in the sum of $1,012,665.17. It is so ordered.

GREEN, *Judge*, and BOOTH, *Chief Justice*, concur.

GRAHAM, *Judge*, took no part in the decision of this case; and MOSS, *Judge*, took no part on account of illness.

A. G. NEWCOMB AND P. A. CONNOLLY, RECEIVERS OF THE McMYLER INTERSTATE CO., v. THE UNITED STATES

[No. E-439. Decided June 10, 1929]

On the Proofs

Contract for repairs; preparatory work; liability insurance.—Plaintiffs' company's informal contract with the United States (Corps of Engineers) for repairs construed, and *held* to entitle plaintiffs to compensation for all work claimed except expenses of a superintendent in commencement of the work and cost of employers' liability insurance.

The Reporter's statement of the case:

Messrs. James W. Good and *W. W. Ross* for the plaintiffs.

Mr. George Dyson, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The McMyler Interstate Company, the original plaintiff, was organized under the laws of the State of Ohio, having its principal office and place of business at Bedford, near Cleveland, in that State. On June 2, 1928, and since the commencement of this suit, A. G. Newcomb and P. A. Connolly, receivers, were substituted as plaintiffs in this case, by order of court.

II. On or about January 17, 1921, plaintiffs' company received a communication from representatives of the defendant at Florence, Alabama, stating that one of the three derricks previously furnished the defendant by the company had been broken and needed immediate repair. The company's general superintendent of erection, O. M. Carse, immediately proceeded to Florence, Alabama, and after consultation with the officers in charge determined upon the requirements of the repair. Following the discussion of these requirements, Mr. Carse was given the following memorandum by Major Godfrey of the Corps of Engineers for transmission to the plaintiffs' company:

"The district engineer has approved the following tentative agreement as to the repair of the McMyler derrick:

"The McMyler Company to send its erecting derrick at once from Norfolk, Va., under such convoy as may be necessary; United States to pay the freight on the derrick. United States to pay a rental of $25.00 per day, excluding Sundays, for this derrick upon arrival here. The McMyler Company to pay the expense of shipping this derrick to Cleveland upon completion of its duty at Florence, except for any excess over the cost of shipping to Cleveland from Norfolk. The McMyler Company to furnish Mr. Harrigan as superintendent of erection and such additional skilled men as may be necessary to form the nucleus of an erecting organization. The United States to pay the railroad fare of these men to Florence but not away from Florence. The United States to pay for their services at the regular rates, $300.00 per month for Mr. Harrigan and $1.10 per hour for his assistants, plus 20% overhead. Said time to include the time while on their way to Florence. United States to furnish such additional labor and shop work as shall be necessary for the repair of the derrick.

"Authority has been requested from Washington to proceed at once with the work, and you will be promptly and

formally notified and an order placed with you embracing the above provisions."

III. Thereupon Mr. Carse went to Norfolk, arranged for the shipment of the company's erecting derrick and for the transfer of Mr. Harrigan and certain of his assistants from Norfolk to Florence, Alabama. Mr. Carse thereafter went to Philadelphia, Pa., transferred one of his assistants from work in that area to take Mr. Harrigan's place in Norfolk, and returned from Philadelphia to the company's plant near Cleveland. On his return to Cleveland he presented to the plaintiffs' company the memorandum given him, and in reply thereto the company on January 24, 1921, wrote the district engineer in charge of the Wilson Dam at Florence, Alabama, the following two letters:

COLONEL BARDEN,
District Engineer, Wilson Dam, Florence, Alabama.

MY DEAR SIR: Referring to your memorandum addressed to our Mr. Carse, dated Wilson Dam, January 19th, 1921. We suggest that this memorandum be changed to read as follows:

"The McMyler-Interstate Co. to send its erecting derrick at once from Norfolk, Va., under such cónvoy as may be necessary.

"The McMyler-Interstate Co. to furnish Mr. Harrigan as superintendent of erection and such additional skilled men from our own force as may be available and not to exceed the number necessary to form the nucleus of an erecting organization.

"The United States to furnish all additional labor and to furnish all necessary parts, either from its own source or by direct purchase from The McMyler-Interstate Co. as shall be necessary for the repair of the derrick.

"The United States to pay all transportation charges for the erecting derrick from Norfolk, Va., to the site at Florence and to pay the difference in transportation charges from Florence to Cleveland in excess of what the transportation charges would be from Norfolk to Cleveland.

"The United States to pay all transportation and traveling expenses of Mr. Harrigan and his assistants to Florence, Ala.

"The United States to pay the transportation charges and expenses of Mr. Harrigan from Florence to Cleveland in excess of the charges from Norfolk to Cleveland.

"The United States to pay for Mr. Harrigan's assistants at the rate of $1.10 per hour or as much more as it may be necessary to pay to obtain his assistants for this work at Florence.

"The United States to pay for Mr. Harrigan's services at the rate of $300.00 per month.

"The United States to pay such living expenses as may be necessary for Mr. Harrigan and his assistants.

"The United States to pay for the time necessary and at the rates above specified consumed in traveling from Norfolk to Florence for Mr. Harrigan and his assistants.

"The United States to pay for the service of the derrick a rental of $25.00 per day for each and every day the derrick is at Florence starting from the time of its arrival at Florence and ending when the derrick is loaded and billed for reshipment to Cleveland or other destination.

"The United States to pay all insurance covering the men in the employ of The McMyler Interstate Co. who are taken care of and paid by The McMyler Interstate Co. This insurance amounts to about $10 per $100 of the pay roll, or 10% of the pay of the men.

"The United States to pay to The McMyler Interstate Co. for the services above rendered and to cover its overhead charge, 20% on the total pay roll covering this work."

It is understood that the only dollars to be paid by The McMyler Interstate Co. will be the actual pay-roll expense and the insurance of the men carried on The McMyler Interstate Co.'s pay roll and such expenses of the men as may be O. K'd by the United States.

The only change we have made in this memorandum, except for the rearrangement of same, is the question of insurance, and expense of the men.

We understand from the pencil memorandum attached to the original memorandum that this arrangement has been approved by the department at Washington. Referring to the pencil memorandum, which reads as follows:

"The department approves arrangement with you for repairs to portal derrick. Request you expedite action in every way possible. Plates and shapes are on hand."

(Signed) BARDEN, *Dist. Engineer.*

Yours very truly,

THE MCMYLER INTERSTATE CO.,
——— ———, *President.*

Colonel BARDEN,
District Engineer, Wilson Dam,
Florence, Alabama.

MY DEAR SIR: Referring to the memorandum covering the repair of your portal derrick.

We feel that you have made a very good bargain in arranging agreement as indicated in your memorandum. It is only because of our friendly feeling and our interests in the equipment that we could afford to permit this agreement to stand. Ordinarily we should have a minimum of 15%, covering the total cost of the repairs. This is our standard basis for doing this kind of work. However, as stated above, we are interested in this equipment and are anxious to help you along.

Very truly yours,

THE MCMYLER INTERSTATE CO.,
——— ———, *President.*

IV. No answer was received to this communication, but on February 16 the engineer office, U. S. Army, at Florence, Alabama, issued to the plaintiffs' company the following order:

Order No. S-12696.

WAR DEPARTMENT,
ENGINEER OFFICE, U. S. ARMY,
Florence, Alabama, February 16, 1921.

THE MCMYLER INTERSTATE CO.,
Bedford, Ohio.

SIR: Your offer dated VERBAL in response to my inquiry of is accepted, and in accordance with its terms please deliver to U. S. Engineer Office, at Sheffield, Ala., *transportation prepaid*, the following supplies:

Item No.	*Repairs to McMyler Derrick No. 5, as shown below:* The McMyler Company to send its erecting derrick at once from Norfolk, Va., under such convoy as may be necessary; United States to pay the freight on the derrick; United States to pay a rental of $25.00 per day, excluding Sundays, for this derrick upon arrival here. The McMyler Company to pay the expense of shipping this derrick to Cleveland upon completion of its duty at Florence, except for any excess over the cost of shipping to Cleveland from Norfolk. The McMyler Company to furnish Mr. Harrigan as superintendent of erection and such additional skilled men as may be necessary to form the nucleus of an erecting organization. The United States to pay the railroad fare of these men to Florence but not away from Florence. The United States to pay for their services at the regular rates, $300.00 per month for Mr. Harrigan and $1.10 per hour for his assistant, plus 20% overhead. Said time to include the time while on their way to Florence. United States to furnish such additional labor and shop work as shall be necessary for the repair of the derrick. *Copy* OM-5C (Repair to McMyler Derrick No. 3)

Send duplicate bills to this office, original only signed by a member of the firm with firm name, together with the bill of lading.

W. J. BARDEN,
Colonel, Corps of Engineers,
District Engineer.

ew By

Meanwhile the plaintiffs' company, in accordance with the general arrangements made, had proceeded to repair the injured derrick, and the work was accepted as satisfactory by the defendant.

V. The need for repairs to the derrick had been occasioned by overloading of the derrick by the defendant's representatives, and to guard against a breakage through overloading the other two derricks the defendant requested Mr. Harrigan to reinforce them, which work was completed and thereafter accepted by the defendant.

VI. The items of expense resulting from the repair by the McMyler Company of the one derrick and the strength-

ening of the other two derricks were invoiced to the defendant and are as follows:

For freight charges on shipment of contractor's equipment from Norfolk, Va., to Sheffield, Ala., as per bill of lading, and Southern R. R. Co.'s freight bill No. 14 attached Jan. 24, 31, 1921		$599.09
For difference between freight charges on shipment on contractor's equipment as shipped from Sheffield, Ala., to Bedford, Ohio, and for identical equipment had it been shipped from Norfolk, Va., to Bedford, Ohio, viz:		
Freight charges from Sheffield, Ala., to Bedford, Ohio, as per Pennsylvania R. R. freight bill #187 attached	$584.26	
Less charges for same shipment from Norfolk Va., to Bedford, Ohio, had shipment moved that way, rates being shown in Norfolk Western Ry. Co. letter of Feb. 15, 1921, attached	295.48	
		288.78
Traveling expenses of J. E. Carse, conveying shipment from Norfolk, Va., to Sheffield, Ala., Jan. 22 to Feb. 1, 1921, as follows:		
Railroad fare, Philadelphia, Pa., to Sheffield, Ala., via Norfolk, Va., and Pullman fare	51.48	
Telephone and telegraph	6.35	
Hotel and meals	81.30	
Street car fare	4.08	
Baggage, checking, and transfer	4.60	
Railroad fare, Sheffield, Ala., to Cleveland	26.69	
Pullman fare, Sheffield, Ala., to Cleveland	11.34	
		185.84
Traveling expenses of O. M. Carse, superintendent, from Cleveland, Ohio, to Florence, Ala., and return to Cleveland, Ohio, Jan. 15, 1921, to Jan. 22, 1921, as follows:		
Railroad fare, Cleveland, Ohio, to Florence, Ala	28.21	
Sleeper	9.07	
Meals	5.85	
Meals at Florence, Ala	3.65	
Taxi from Florence, Ala., to dam	2.50	
Telegrams	4.39	
R. R. fare, Sheffield, Ala., to Norfolk, Va	31.17	
Sleeper	10.94	
Meals	7.00	
R. R. fare, Norfolk, Va., to Philadelphia, Pa	9.46	

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Traveling expenses of O. M. Carse, superintendent, etc.—Continued.		
Sleeper	$4.05	
Meals	4.20	
R. R. fare, Philadelphia, Pa., to Cleveland, Ohio	18.64	
Sleeper	4.86	
Meals	4.50	
		$148.42
Railroad fare of following men from Norfolk, Va., to Sheffield, Ala., for duty in connection with repair work on derrick:		
J. L. Harrigan, Jan. 22, '21, receipts attached	37.72	
W. C. Leonard, ditto	37.72	
B. G. McGavin, ditto	37.72	
J. Collins, ditto	36.75	
J. W. Waymack, ditto	36.01	
		185.92
For services of following employees engaged in repairs to derrick on South Side, Wilson Dam:		
J. L. Harrigan, Supt., $300.00 per mo. Jan. 22–31, inc., 9/30 month	90.00	
J. L. Harrigan, Feb. 1–28, 1921, 1 month	300.00	
J. L. Harrigan, Mar. 1–5, 1921, 5/30 month	50.00	
	440.00	
J. Collins, struct. iron worker, Jan. 31–Mar. 5, 1921, 218 hours, @ 1.10	239.80	
W. C. Leonard, hoisting engineer, Jan. 31–Mar. 5, 194 hours, @ 1.10	213.40	
G. B. McGavin, struct. iron worker, Jan. 31 to March 5, 1921, 218 hrs., @ 1.10	239.80	
J. W. Waymack, foreman, Jan. 31–March 5, 1921, 238 hrs., @ 1.25 per hr	297.50	
J. E. Carse, struct. iron worker (car tracer), Jan. 22–Feb. 1, 76 hours, @ 1.10 per hr	83.60	
	1,514.10	
Plus overhead of 20% as agreed	302.82	
		1,816.92
For employer's liability insurance, as follows, and in accordance with commercial usage:		
$440.00, @ $4.85 per $100	21.34	
J. L. Harrigan, Ohio workman's comp. lia. ins., $1,074.10, @ $5.09 per $100	54.67	
Men-Maryland Casualty Co. liability policy for Alabama, $1,074.10, @ 1.452 per $100	15.60	
Men-Maryland Casualty Co., public policy, $1,074.10, @ .3332 per $100	3.58	
		95.19

Opinion of the Court

For rental of derrick from arrival at Sheffield, Alabama, to completion of work at $25.00 per day from February 1, 1921, to March 5, 1921, 29 days, @ $25.00 per day........ $725.00

4,045.16

Of the above total, $170.05 represents the cost of strengthening the two derricks.

Payment of these amounts has been refused by the defendant.

The court decided that plaintiffs were entitled to recover $3,645.56.

GRAHAM, *Judge*, delivered the opinion of the court:

This case grows out of an informal contract for the repairing of a derrick belonging to the defendant and for strengthening two other derricks. The derricks had been originally constructed by the McMyler Interstate Company, the original plaintiff. Since the commencement of this suit A. G. Newcomb and P. A. Connolly, receivers, have been substituted as plaintiffs by order of the court. The contract originated in a request that the plaintiff's company make the repairs necessary. There was no liability on the company under the original contract to make these repairs. The only question is, to what amount of remuneration are the plaintiffs entitled growing out of the making of the requested repairs.

The company did the work and the work was accepted, and it also did work amounting to $170.05 on two other derricks that needed strengthening at the request of the representatives of defendants. The conditions of payment were embodied in a communication from the company to the defendant, and the latter is liable for the services rendered under that proposal.

The plaintiffs' company presented a bill which afterwards was reduced to $4,045.16, the amount sought to be recovered in this action. There was covered in this bill $134.35 for other expenses of the superintendent in arranging for the commencement of this work and also an item of $95.19 for

employers' liability insurance, which are not embraced in the company's proposal, and can not therefore be allowed. The other disputed item of $170.05 for strengthening two derricks clearly should be paid. The company was requested to do the work by the officer in charge, and did the work. There is no dispute that the amount is reasonable.

The plaintiffs are entitled to recover the amount claimed, less the two items of $134.36 and $95.19 just mentioned, and it is so ordered.

SINNOTT, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice,* concur.

MOSS, *Judge*, took no part in the decision of this case, on account of illness.

WARNER-PATTERSON CO. v. THE UNITED STATES

[No. F-154. Decided June 10, 1929]

On the Proofs

Excise tax; automobile accessories; lenses; definition of manufacturer, producer.—A taxpayer who holds exclusive licenses to sell and distribute patented lenses, maintains exclusive control of their designs, specifications and molds, orders the lenses from factories under an agreement to make them for no other person, is the contractor for the delivery of the lenses to the purchasers and reimburses the factories from the profits derived from sales, is a "manufacturer" or "producer" of such lenses within the meaning of sections 900 of the revenue act of 1921 and 600 of the revenue act of 1924, imposing an excise tax on accessories for automobiles, to be paid by the manufacturer, producer, or importer, and a Treasury regulation under which the statute is so construed is reasonable and enforceable.

Claim for refund of taxes; suit against United States; change in basis of claim.—Where a taxpayer bases its claim for refund of taxes before the Commissioner of Internal Revenue on specified grounds, it can not in suit against the United States urge another and a different basis for refund.

The Reporter's statement of the case:

Mr. George M. Wilmeth for the plaintiff.

Mr. Ralph C. Williamson, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. Arthur J. Iles* was on the brief.

The court made special findings of fact, as follows:

I. Plaintiff is a corporation organized, existing, and operating under and by virtue of the laws of the State of Illinois with its office and principal place of business located at Chicago, Illinois.

II. Plaintiff during the period covered by the claim involved in this suit held an exclusive license to sell and distribute a prismatic light lens patented and sold under the trade name of "Warner" lens; and also held during a part of said period an exclusive license to sell and distribute another prismatic light lens patented and marketed under the trade name of "Patterson" lens. Later plaintiff purchased and now owns the patented design for the "Patterson" lens.

III. The plaintiff was at all times during the period in question the contractor for the delivery of the lenses in question to the various purchasers and made the profits from the sale of them, and from the profits necessarily reimbursed all expenditures on account of the lenses by paying to the factories—who were the McKee Glass Company, the Indiana Glass Company, and D. C. Jenkins Glass Company—certain agreed amounts for making the lenses which varied according to the fluctuating price of glass, and which were determined at the time of the placing of orders with the aforesaid factories, either for immediate delivery or for specific quantities to be delivered on specific dates. Plaintiff at all times maintained exclusive control of its designs, specifications, and molds, and the aforesaid factories at all times were subject to the orders of the plaintiff. Ordinarily orders received by plaintiff were filled from the stock of lenses kept on hand by plaintiff, but if the aforesaid stock proved insufficient to fill any particular order by any particular purchaser the aforesaid factories shipped the order from the particular factory, filling it according to the direction of the plaintiff.

The invoices returned by factories to plaintiff never showed any tax to have been paid by any factory. The aforesaid factories could make the lenses in question only for plaintiff.

The lens known as the "Warner lens" is adaptable for use on lights other than automobile lights, but the major portion of these lenses were designed and sold primarily for the automotive trade. The lens known as the "Patterson lens" was designed and sold exclusively for use on automobiles and trucks.

IV. Between the dates of June 1, 1923, and June 30, 1925, there were levied, assessed, and collected from plaintiff, and paid by plaintiff to the United States collector of internal revenue at Chicago, Illinois, taxes in the amount of $6,109.97, which taxes were levied, assessed, collected, and paid under the provisions of subdivision (3) of section 900 of the revenue act of 1921 and subdivision (3) of section 600 of the revenue act of 1924, on the sales by plaintiff of prismatic light lenses manufactured for and sold by plaintiff in the circumstances and manner hereinbefore described.

V. Thereafter—that is, under date of July 28, 1925—plaintiff filed with the Commissioner of Internal Revenue a claim for refund of said sum of $6,109.97 based on the ground or contention that it (plaintiff) was not the manufacturer or producer of the lenses on the sales of which said taxes had been levied, assessed, collected, and paid within the meaning of section 900(3) of the revenue act of 1921 and section 600(3) of the revenue act of 1924.

Said claim for refund is in words and figures as follows:

"CLAIM FOR REFUND OF TAXES ILLEGALLY COLLECTED

"STATE OF ILLINOIS,
"*County of Cook*, *ss:*

"Warner-Patterson Company, 914 South Michigan Avenue, Chicago, Illinois.

"This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

"Business in which engaged: Distributing headlight lenses.

"Character of assessment or tax: Manufacturers' excise tax from July, 1923, to June, 1925.

"Amount to be refunded (or such greater amount as is legally refundable), $6,109.97.

"Deponent verily believes that this application should be allowed for the following reasons:

"This claim is for a refund of tax paid by us on antiglare headlight lenses for the period from July, 1923, to June, 1925, inclusive.

"That a tax on antiglare headlight lenses is provided in section 900, subdivision (3) of the revenue acts of 1918 and 1921, and section 600 of the revenue act of 1924, to be paid and returned by the *manufacturer* thereof.

"That the Warner-Patterson Company do not *manufacture*, *make*, or *produce* antiglare headlight lenses. They own no glass plant, nor have they any interest in any such producing glass plants, but are distributors of antiglare headlight lenses, on which they pay a royalty to the owners of the patent of the basic principle common to all antiglare headlight lenses, and own only the design of reflector which they sell.

"That they contract with the glass manufacturers to make these lenses complete, furnish them with no raw material, and only supplying them with a design on which they do no further manufacture in any particular, but sell them to dealers and the consumer as they are produced by the manufacturer.

"That the Commissioner of Internal Revenue can not, nor would the court sustain the department if they should hold any other than the manufacturer liable for the tax. It is an accepted definition of a manufacturer to be a maker or producer, not the owner of a design or a patentee who engages or hires a manufacturer to make an article from his design or his patent.

"We ask the department to give consideration to this claim for a refund of tax paid by us in error. We also request that the receipts attached herewith be returned to us after they have served their purpose with the department."

Said claim was rejected by the Commissioner of Internal Revenue on December 2, 1925.

The court decided that plaintiff was not entitled to recover.

SINNOTT, *Judge*, delivered the opinion of the court:

Plaintiff seeks to recover $6,109.97, with interest, alleged to have been erroneously exacted by the United States as excise taxes on articles known as the Warner lens and Patterson lens, between the dates of June, 1923, and June, 1925,

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inclusive, under provisions of section 900 of the revenue act of 1921 (42 Stat. 227, 291) and section 600 of the revenue act of 1924 (43 Stat. 253, 322).

Plaintiff, during the period covered by the claim involved in this suit, had an exclusive license to manufacture, sell, and distribute said lenses. Plaintiff during said period purchased the patent for the Warner lens. During the period in question plaintiff sold all the lenses which are the subject of this suit. It did not, however, actually perform the labor necessary to the finished product. That labor was performed by three factories under the following arrangement:

Plaintiff endeavored to keep a sufficient stock of the various sizes of the lenses in question on hand at all times. Occasionally, however, purchasers did place orders with plaintiff which could not be filled from the stock. On such occasions it was plaintiff's practice to transmit the orders to one of the three factories which would either ship the finished product when completed to plaintiff or to the purchaser, according to the direction of the plaintiff. On other occasions plaintiff directed the Kelly Reasner Agency, which purported to be the agent for all three of the factories, to furnish specified amounts as needed by plaintiff to keep its stock intact, and at the time of so directing the agency determined the prices to be paid for making the lenses. This price varied according to the fluctuating price of glass. When the price of glass was high plaintiff paid the factories correspondingly higher for the lenses shipped to plaintiff, or the purchasers from plaintiff.

The lenses in question were made from plaintiff's molds, according to the patented designs, and the specifications furnished by plaintiff to the factories. These factories could make the lenses in question, only for the plaintiff and for nobody else, and at all times the record shows the factories to have been subject to the plaintiff's orders, and plaintiff at all times maintained exclusive control of its designs, specifications, and molds.

Plaintiff was the only one who could contract for the sale of the lenses in question, and also made the profits from the sales of these lenses, and from these profits paid to the fac-

tories the cost of raw material, which varied, plus a certain specified profit, as well as the cost of labor.

The Patterson lenses were sold exclusively for use on automobiles and trucks. According to one witness 60% and according to another 70% of the Warner lenses were sold to the automotive trade.

On July 28, 1925, plaintiff filed a claim for refund with the Commissioner of Internal Revenue for manufacturer's excise tax so paid on the lenses in question for the period from June, 1923, to June, 1925, inclusive, in the amount of $6,109.97. This claim was rejected by the Commissioner of Internal Revenue on December 2, 1925.

Said claim was based solely on the ground that plaintiff was not the manufacturer or producer of the lenses in question. (Finding V.) Plaintiff in its petition seeks to add another ground for its claim, namely, that the lenses in question are not parts or accessories of automobiles. This ground was not urged as a basis for refund before the Commissioner of Internal Revenue and can not be urged here. See *Kaltenbach* v. *United States*, No. D–584, decided by this court January 7, 1929 (66 C. Cls. 581), quoting from *Red Wing Malting Co.* v. *Willcuts*, 15 Fed. (2d) 626, where the court said:

"The precise ground upon which the refund is demanded must be stated in the application to the commissioner, and we think, if that is not done, a party can not base a recovery in the court upon an entirely different and distinct ground from that presented to the commissioner."

The sole question for decision is whether plaintiff is a "manufacturer" or "producer" of the lenses in question, within the meaning of section 900 of the revenue act of 1921 and section 600 of the revenue act of 1924, *supra*.

The taxing acts provide that the taxes with which this suit is concerned—

"* * * shall be * * * paid by the manufacturer, producer, or importer."

Plaintiff contends that it was not the "manufacturer" or "producer" of the articles in question, because it did not do the actual labor necessary to produce the finished product.

Article 7 of the Treasury Regulations 47, under the revenue act of 1921, defines a manufacturer as follows:

Opinion of the Court

"A manufacturer is generally a person who (1) actually makes a taxable article, or (2) by changes in the form of an article produces a taxable article, or (3) by the combination of two or more articles produces a taxable article. Under certain circumstances, however, the person who actually makes, produces, or assembles the taxable article is not the manufacturer for the purpose of the tax. There may be several stages of manufacture and several manufacturers, each of whom must pay a tax. In such cases the tax attaches on successive sales, subject to the provisions as to credits (see art. 6). The following examples are merely illustrative:

* * * * *

"Example 3. 'A', a dealer or jobber, contracts with 'B' for the manufacture of a taxable article, whereby 'B' receives from 'A' the cost of materials and labor plus a specified profit. 'A' is the manufacturer.

* * * * *

"Example 5. 'A,' a dealer or jobber, owns a patent, trade, formula, or recipe for a taxable article, and contracts with 'B' for the manufacture thereof, the contract specifying that 'B' can manufacture the article only for 'A'; that 'A' will take the entire output; and that it will be sold by 'A' as the manufacturer, 'B's' name not appearing on the article. 'A' is the manufacturer."

Article 7 of Regulations 47 under section 600 of the revenue act of 1924, provides substantially the same.

It is apparent that plaintiff is clearly within the examples cited above.

The regulations above cited seem to us to be reasonably adapted to the enforcement of the act in question, and do not appear to be in conflict with the expressed statutory provisions in question.

The examples cited in the regulations seem to be based upon the maxim "*Qui facit per alium facit per se.*"

The record shows conclusively that during the period in question plaintiff was in the same position as the owner of the patents, and no one else could manufacture the lenses without the consent of the plaintiff. For all practical purposes the three companies occupied the position of plaintiff's factories for the production of the lenses. Plaintiff had at all times exclusive control of the designs which it submitted to the factories, and none of the factories could

produce the lenses from these designs without the consent of the plaintiff. Plaintiff also saw to it that these lenses were made according to the specifications as submitted to the three factories. Plaintiff also submitted molds from which the lenses were made. These molds were also subject to the exclusive control of plaintiff. It is apparent to us from the record that the three factories were the factory agents of the plaintiff for the production of the lenses.

In *Foss-Hughes Co.* v. *Lederer*, 287 Fed. 150, the court said, with reference to the meaning of the words "manufacturer" and "producer," in section 600 of the revenue act of 1917 (40 Stat. 316):

"There is no claim that the plaintiff imports, and none that he is a manufacturer, except in the sense in which one who has something made for him by others, to be sold by him, may be said to be a manufacturer. This is doubtless the sense in which Congress used the word 'producer,' and was also doubtless the occasion for its use."

Plaintiff cites in its brief, on the point that the terms "producer" and "manufacturer" are synonymous, *Hancock* v. *State* (40 S. E. 317; 114 Ga. 439).

What the court said in that case would seem to be against plaintiff's contention, as it held not only that said words were synonymous but also that a manufacturer is one who causes an article to be made:

"We hold that the word 'producer,' as used in the special act, is identical in meaning with 'manufacturer'; and the latter term, of course, applies both to him who actually makes the wine, and to him who causes it to be made." (*Hancock* v. *State*, 40 S. E. 318.)

The case of *Carbon Steel Co.* v. *Lewellyn*, 251 U. S. 501, is a case in point on the meaning of the word "manufacturer." In that case petitioner contended that it did not manufacture munitions; that the munitions were manufactured by independent contractors.

The Supreme Court held as follows:

"The act is explicit in its declaration; perplexity and controversy come over its application. One must be a 'person manufacturing' to incur the tax, but who is to be regarded as such person in the sense of the act? or to put another way, when is 'manufacturing' (the word of the act) done, and

when is 'manufactured' (the word of the act) attained? In elucidation of the words, the specifications enumerate nine operations to produce a shell, that is a completed shell (except for explosive charge and detonating device), such as petitioner contracted to deliver to the British Government. And all of the operations are asserted to be necessary and all must be performed seemingly by the same person in order that he may be designated as a 'person manufacturing.' We put aside for the purpose of testing the contention the provision of the act making a person manufacturing 'any part of any of the articles mentioned' subject to 'a tax.'

"The contention reduces the act to a practical nullity on account of the ease of its evasion. Besides, petitioner minimizes what it did. It was the contractor for the delivery of shells, made the profits on them and the profits necessarily reimbursed all expenditures on account of the shell. It was such profits that the act was intended to reach—profits made out of the war and taxed to defray the expenses of the war. Or, as expressed by the Court of Appeals, Congress 'felt that the large abnormal profits incident to these war contracts created a remunerative field for temporary taxation.' Petitioner, it is true, used the services of others, but they were services necessary to the discharge of its obligations and to the acquisition of the profits of such discharge. And petitioner kept control throughout—never took its hands off, was at pains to express the fact, and retained its ownership of all of the materials furnished by it, and the completed shell belonged to it until delivered to the British Government. * * *

"We recognize the rule of construction, but it can not be carried to reduce the statute to empty declarations. And, as we have already said, petitioner's contention would so reduce it. How universal must the manufacturing be? Will the purchase of an elemental part destroy it? And how subsidiary must the work of the subcontractor be not to relieve the contractor—take from him the character of a 'person manufacturing'? And such is the tangle of inquiries we encounter when we undertake to distinguish between what a contractor to deliver a thing does himself and what he does through others as subsidiary to his obligation.

"It is after all but a question of the kind or degree of agency—the difference, to use counsel's words, between 'servants and general agents' and 'brokers, dealers, middle men, or factors.' And this distinction between the agents counsel deems important and expresses it another way, as follows: '"Every person manufacturing" means the person doing the actual work individually, or through servants or

general agents, and that the ownership of the material worked upon does not alter this meaning of the word.'

"We are unable to assent to this meaning of the word. It takes from the act a great deal of utility and makes it miss its purpose. Of course, it did not contemplate that a 'person manufacturing' should use his own hands—it contemplated the use of other aid and instrumentalities, machinery, servants, and general agents, availing thereby of the world's division of labor; but it contemplated also the world's division of occupations, and, in this comprehensive way, contemplated that all of the world's efficiency might be availed of, and, when availed of for profits, the latter could not thereby escape being taxed. And where, indeed, was the hardship of it? The tax was on profits and measured by them."

We must conclude that plaintiff was a manufacturer or producer, within the meaning of the taxing act. Plaintiff's petition will be dismissed. It is so ordered.

GREEN, *Judge*, and BOOTH, *Chief Justice*, concur.

GRAHAM, *Judge*, took no part in the decision of this case; and MOSS, *Judge*, took no part, on account of illness.

A. G. NEWCOMB AND P. A. CONNOLLY, RECEIVERS OF THE McMYLER INTERSTATE CO., v. THE UNITED STATES

[No. E-440. Decided June 10, 1929]

On the Proofs

Contracts; Government's delay in preparatory work; collection of liquidated damages.—Where a Government contractor, on account of delay by the Government in preparatory work, is unable to perform by the date fixed in the contract, the time consumed after such date is not to be attributed to delay on the part of the contractor for which liquidated damages may be collected or withheld.

The Reporter's statement of the case:

Messrs. James W. Good and *W. W. Ross* for the plaintiffs.

Mr. George Dyson, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The company of which the plaintiffs are receivers is a corporation organized under the laws of the State of Ohio, having its principal office at Bedford, Ohio. On June 2, 1928, A. G. Newcomb and P. A. Connolly, receivers of said company, were substituted as plaintiffs by order of court.

II. On November 17, 1919, the plaintiffs' company entered into a written contract with Lieutenant Colonel Lytle Brown, Corps of Engineers, U. S. Army, acting as contracting officer for the United States, which said contract was approved by the Chief of Engineers on December 1, 1919, whereby the company agreed to furnish and erect on the site of Wilson Dam, Tennessee River, near Florence, Alabama, three steel traveling tower derricks, the United States agreeing to pay $36,000.00 for each derrick. A copy of this contract and the accompanying specifications was attached to the petition as Exhibit "A" and is made a part hereof by reference. The erection of the first derrick was to be completed within 140 days, the second within 154 days, and the third within 168 days after receipt of notice of approval of the contract by the Chief of Engineers, which notice the company received on December 2, 1919. The contract date for the completion of the erection of the first derrick was, therefore, April 19, 1920; for the second, May 3, 1920; and for the third, May 17, 1920.

III. The site of these three derricks was to be the bed of the Tennessee River which the Government was then preparing for the reception of these structures by the building of a cofferdam.

The materials for these derricks being ready for shipment and men being then available, the plaintiffs' company on February 2, 1920, sent its representative to the site to determine how soon conditions would warrant the beginning of the installation. He found the cofferdam not more than forty per cent complete.

Thereafter the company continued to keep itself advised of conditions at the site and from time to time shipped materials in order to be prepared for installation at the earliest possible moment. On April 26, 1920, the company's erect-

ing crew arrived at the location and remained there until work could be begun upon the first derrick.

IV. The Government did not complete the cofferdam, making the bed of the river available, until about May 1, 1920, and did not complete the foundation for the first derrick until May 17, 1920. By May 20, 1920, the concrete in the foundation had set sufficiently for the defendant to lay rails and the company began the work of erecting the first derrick on that date.

Concrete for the second derrick was put in May 25th, the rails laid by the 27th, and the company began work on that date. Concrete for the third derrick was put in June 18th, the rails laid by the 30th, on which date the company began work.

The defendant delayed work on the first derrick 168 days, on the second 178 days, and on the third derrick 178 days.

The company completed the installation of these three derricks on July 31, 1920, August 30, 1920, and September 15, 1920, respectively. Approximately one hundred days is a reasonable time for the erection of three such derricks, when the work is concurrently done.

After the work of installation was begun within the cofferdam the company experienced about 5% delay as a result of blasting operations going on in defendant's adjoining work, and a delay from August 16th to August 25th as the result of high water which flooded the cofferdam.

V. On May 22, 1920, the company addressed a letter to Lieutenant Colonel Brown, Engineers Office, at Florence, making inquiry as to the method to be pursued to claim extension of time so that penalties would not be assessed. To this question Major Godfrey, Chief of Supply Division in the U. S. Engineers Office at Florence, replied that it should submit a statement of fact to the Engineers Office for transmission to the Chief of Engineers for final decision. On July 3, 1920, such a statement was made by letter to Major Godfrey. To this Major Godfrey made reply asking for further information. It does not appear that this letter was replied to. On November 27, 1920, the sum of $8,525.00 was deducted from one of the company's vouchers as liqui-

dated damages. The company accepted this voucher under protest.

On February 12, 1921, the company made formal request on the Engineers Office (attention of Major Godfrey) for a waiver of liquidated damages, and on February 25, 1921, the company was informed by Major Godfrey that it had been forwarded to the Chief of Engineers at Washington.

VI. On April 2, 1921, Major Godfrey wrote the plaintiffs' company that he had carefully considered the company's request; that Colonel Barden, the district engineer, had prepared a recommendation to the Chief of Engineers that liquidated damages be waived, and actual damages of $1,275 be withheld, but that the same had not yet been transmitted. A copy of that recommendation was inclosed and the company was requested to sign the voucher submitted therewith and forward the same to the district engineer's office if the proposed arrangement was acceptable; this voucher for $7,250 being made up of the sum of $8,525 previously deducted as liquidated damages, less $1,275, the amount of actual damage as found, claimed to be the actual cost of a track necessary to lay on account of delay in completion of the derricks.

The plaintiffs' company by letter of April 11, 1921, demurred to this arrangement, but on April 29, 1921, wrote Colonel Barden, the district engineer, that they would accept the voucher with the deduction of $1,275.

The recommendation and the voucher were transmitted on May 7, 1921, by Major Godfrey to the Chief of Engineers through the division engineer.

VII. This voucher in the sum of $7,250 was on June 13, 1921, submitted by the Secretary of War for an advanced decision. On July 9, 1921, the voucher and papers were returned to the Secretary of War with the advice that the matter should be handled by the General Accounting Office.

VIII. Nothing further was done definitely about this claim until July 18, 1927, when the Comptroller General disapproved the findings of the district engineer as made May 7, 1921, and refused to allow the claim.

IX. Plaintiffs' company has received in cash or equivalent the sum of $88,675 on this contract.

Opinion of the Court

X. The claim here sued upon grew out of the fact that the work was not completed within the time prescribed by the contract, due in whole or in part to the original delay caused by the defendant. On account of the fact that the work was delayed at the outset, and to some extent thereafter, by the defendant, it does not satisfactorily appear what portion, if any, of the entire delay was attributable to the plaintiff.

The court decided that plaintiff was entitled to recover. Counterclaim disallowed.

GRAHAM, *Judge*, delivered the opinion of the court:

The original plaintiff was the McMyler Interstate Company. Since the commencement of this suit A. G. Newcomb and P. A. Connolly, receivers of said company, have been substituted as plaintiffs.

On November 17, 1919, the McMyler Interstate Company entered into a written contract with the Government for the erection of three steel traveling tower derricks in the bed of the Tennessee River, near Florence, Alabama. The Government at the time was preparing for the reception of these derricks by building a cofferdam, but the work on this cofferdam was not completed, so that the bed of the river was not available for work by the company until about May 1, 1920, and the foundation for the first derrick was not completed until May 17, 1920.

It appears from the findings that the defendant had delayed the work on the first derrick 168 days, on the second 178 days, and the third 178 days. There was a provision in the contract for liquidated damages, and liquidated damages were assessed against the company, and payment of a part of the contract price was withheld. Inasmuch as the Government delayed the work in the beginning and also afterwards, the court will not undertake to fix the date from which liquidated damages will begin to run (see *Greenfield Tap & Die Corporation* v. *United States*, No. F-157, decided by this court May 6, 1929 [*ante*, p. 61]), and the plaintiffs are entitled to recover said amount so withheld.

The Government is asserting a claim for $1,275 by way of a deduction, but the findings show that this was practically

withdrawn in the negotiations between the parties. It grows out of a claim that the Government had to expend this sum in constructing a track it would not have been required to construct if the derricks had been completed within the contract time. As the court has not undertaken to fix responsibility for delays, and the findings do not show that the delays were due to acts of the company, it follows that this claim can not be allowed.

The company completed the contract, and the Government accepted the work. The contract price was $36,000 for each of the three derricks, making a total of $108,000. The company has received in cash or its equivalent the sum of $88,675, leaving a balance of $19,325, and for this amount plaintiffs are entitled to judgment, and it is so ordered.

SINNOTT, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

Moss, *Judge*, took no part in the decision of this case, on account of illness.

DAILY PANTAGRAPH, INC., v. THE UNITED STATES[1]

[No. F-88. Decided June 10, 1929]

On the Proofs

Income and profits taxes; abandonment of special assessment; jurisdiction.—Where plaintiff has been given a special assessment for a taxable year, but the Commissioner of Internal Revenue thereafter, in final determination of plaintiff's income and profits tax liability, bases the same on statutory capital, the jurisdiction of the Court of Claims is not excluded under the *Williamsport Wire Rope Co. case*, 277 U. S. 551.

Same; final rejection of claim for refund; statute of limitations.—Where a taxpayer has filed a claim for refund, and the Commissioner of Internal Revenue writes the taxpayer that it "will be rejected," the expression, in so far as it relates to the running of the statute of limitations, means that the commissioner has definitely rejected the claim.

[1] Certiorari granted.

Reporter's Statement of the Case

Same; concurrent proceedings before Board of Tax Appeals; jurisdiction.—Where in a tax case before the Court of Claims the same matters are pending before the Board of Tax Appeals, but before the case is decided in the court the proceedings before the board have ended, the court will proceed to a determination of the case without the filing of a new petition.

Same; invested capital; intangible property; circulation structure of periodical.—The "circulation structure" of a periodical is intangible property, and where a company has received the value of the same as a gift it can not be included, under the revenue acts, in invested capital.

Same; accrual basis; exception as to Federal taxes.—Where a taxpayer's books are kept and its returns made on an accrual basis, except as to Federal income and profits taxes, the act of the Commissioner of Internal Revenue in accruing the said taxes for the purpose of correcting the invested capital is in accordance with the law. See *American Bronze Powder Mfg. Co.* v. *United States*, 67 C. Cls. 564.

Same; availability of income for dividends; deduction of accrued taxes.—In determining the amount of income available to a taxpayer for the payment of dividends paid after the first 60 days of a given year the action of the Commissioner of Internal Revenue in reducing the net available income earned from January first of the given year to the extent of the pro rata amount of Federal income and profits taxes for that year which he held had accrued up to the date of the dividend payment, was correct.

The Reporter's statement of the case:

Mr. Arnold L. Guesmer for the plaintiff.

Mr. Joseph H. Sheppard, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. Plaintiff is a corporation and duly filed income and profits tax returns for the periods of 1909 to 1921, as shown by Exhibit A attached to the stipulation of the parties filed herein and which is made part hereof by reference. Upon the income so reported, income and profits taxes were assessed and paid as also shown by Exhibit A. On May 6, 1921, the Commissioner of Internal Revenue, after reviewing the assessments made, advised plaintiff that there had been an overassessment of $4,067.78 for the fiscal year ending October 31, 1917, an overassessment of $2,741.99 for the

two months' period of November and December, 1917, and that there was an additional tax due of $11,724.97 for the year 1918. The overassessments for the year 1917, as above stated, were credited against the additional tax assessed for 1918 and the taxes remaining for the year 1918 were assessed and paid as shown by Exhibit A.

About December 13, 1922, and February 19, 1923, plaintiff executed amended returns for the years 1909 to 1921, inclusive, as shown by Exhibit A, and filed certain claims with the Bureau of Internal Revenue with reference to the taxes for said years.

The Commissioner of Internal Revenue made an examination of the said amended returns of the plaintiff and sent the plaintiff, under date of March 14, 1925, a sixty-day deficiency letter, a copy of which is attached to the stipulation marked "Exhibit 1" and is made part hereof by reference. This deficiency letter expressed the final conclusion of the commissioner, but the plaintiff does not admit that any of its claims for 1917 to 1921 have been denied or rejected within the meaning of the law.

In said sixty-day letter the commissioner made use of what he considered the taxpayer's statutory capital (instead of sections 210 and 327 and 328), and that resulted in an overassessment of $2,639.18 for the year 1917, and a deficiency in tax amounting to $3,243.33 for the year 1918, the tax liability for the year 1918 being thus found by the commissioner to be $3,243.33 in excess of the tax as previously computed by him under the relief provisions of sections 327 and 328 of the revenue act of 1918, set forth in said letter dated May 6, 1921, and the tax liability for the year 1917 being thus found by him to be $2,639.18 less than the tax as previously computed by him under the relief provisions of section 210 of the revenue act of 1917 and set forth in said letter dated May 6, 1921. Plaintiff does not admit the correctness of the commissioner's findings or determinations.

Plaintiff made claims for refund of overpayment of income and profits taxes as set forth in Exhibit A, these claims being made with reference to income and profits taxes for the years 1917 to 1921, inclusive. The assessments

of taxes shown by Exhibit A were paid by plaintiff on notice and demand to avoid penalties and interest. Defendant has failed to allow or pay the amount covered by said claims or any part thereof.

II. Plaintiff, since January 1, 1908, has been engaged in publishing in Bloomington, Illinois, a newspaper called the Daily Pantagraph.

The newspaper was established in 1846. In 1868 W. O. Davis purchased it, and from that time until January 1, 1908, he published the paper and owned the same and all the property used in the publication thereof.

Immediately before the transfer of the business by Davis to the plaintiff his books showed the following assets and liabilities:

ASSETS		LIABILITIES	
Cash on hand	$1,085.55	Accounts payable:	
Accounts receivable	35,105.20	Trade	$9,286.00
Inventories	6,137.49	Other	43.39
Land and buildings	25,000.00		
Plant and fixtures	22,336.99	Total	9,329.39
Office furniture	4,046.49	Surplus	84,532.33
Associated Press membership (a bond in that association)	75.00		
American Newspaper Publishers Association (an item paid on account of membership in that association)	75.00		
Total	93,861.72	Total	93,861.72

Immediately after the transfer, the plaintiff's books showed the same assets and liabilities, at the same figures, except that the $84,532.33 was divided into $80,000 capital stock and $4,532.33 surplus.

The above-described assets were transferred at the end of December, 1907, by Davis to the plaintiff and the accounts-payable items were assumed by it. The plaintiff issued to Davis $80,000 capital stock. No other capital stock was ever issued by the plaintiff.

Davis became the owner of all the stock of the plaintiff to which he had transferred his whole newspaper business and

the property thereof, and continued throughout the remainder of his life to be the sole owner of all its stock except ten shares which he sold to C. C. Marquis. Davis incorporated his business because he was getting old and was in poor health and so that he could more readily dispose of his business property in his will. He had three children, none of whom were actively engaged in the business.

C. C. Marquis had been employed by Davis since 1877, and he had been business manager of the newspaper since some time in the eighties. Shortly after the incorporation of the business Davis sold Marquis ten shares of stock for $2,500, a special price with no relation to the market value, to keep him in the business, with which he was thoroughly familiar. Davis refused to sell more stock to Marquis or to sell any stock to other employees, at any price, for he desired to keep the stock in his family.

The business was an old and well established one, which steadily made substantial net profits, averaging approximately $36,000 for the three years prior to January 1, 1908.

At the time of the incorporation of the business Davis instructed his bookkeeper to make a statement of the tangible assets at very low figures. This was done, and the above statement of assets and liabilities was prepared and used as a basis for the issuance of stock. The $80,000 capital stock was arrived at because it was the largest round figure, and the $4,532.33 remained as surplus. All of the business property was to be and actually was transferred to the plaintiff, including good will, circulation, structure, and the Associated Press membership, but Davis did not desire to have a large number of shares of stock outstanding, for he did not intend to offer any of them for sale. His sole intention was to keep the business intact and pass the stock on to his family. The plaintiff's stock has always been closely held, at first by Davis and Marquis and later by the family of Davis and Marquis. Davis died in 1911.

The land transferred to the plaintiff consisted of a corner lot 24 feet on Washington Street, the principal street of the city, by 115 feet on Madison Street, the next important street, which lot Davis purchased in 1875, and an adjoining lot, 22 feet on Washington Street by 115 feet deep, which lot Davis

purchased in 1887 for $3,000. The two lots had a value of $7,000 in 1887. Between 1887 and 1907 there was a steady increase in land values in the business section of the city. The population increased and business activity increased. In 1901 a hotel, the largest and most modern hotel in the city at that time, was constructed on the opposite corner from this property, and in 1906 an electric-car line was constructed and operated on Madison Street. In 1907 the two lots had a value of at least $12,000.

The building transferred to the plaintiff was erected by Davis in 1887. It covers both of the above-mentioned lots as to width and depth, is three stories high, and the basement extends under the entire building and out under the sidewalks to the curbing. The basement windows extend above the sidewalks, admitting daylight. The foundation and thirteen-inch walls are constructed of substantial masonry—that is, of good brick and mortar. The joists and flooring are wooden and the walls are plastered. The floors are partitioned off to suit the needs of the publishing business. The presses have always been placed upon concrete foundations so as to eliminate vibration of the building. The floor on which the linotype machines are located is covered with sheet metal. The building is specially adapted to the printing and publishing business, and has always been kept in good repair, so that in 1907 there was no evidence of deterioration; the mortar was sound, the walls plumb and free from cracks, except for one or two minor ones, the floors were sound, and the plaster in good condition. The plaintiff has used the building continuously since January 1, 1908, and it is still in good condition and has an expected useful life of about thirty-six years from the present time. In December, 1907, the building had a value of at least $35,000. The commissioner included the land and building in the plaintiff's invested capital at $25,000, the amount of stock issued therefor, whereas they had on December 31, 1907, a cash value of $47,000. A depreciation rate of 1¾ per cent from January 1, 1908, is a reasonable allowance for exhaustion, wear, and tear computed on 1908 value. The cost of additions to the building since January 1, 1908, is not in dispute.

Reporter's Statement of the Case

The plant and equipment transferred to the plaintiff in December, 1907, consisted of a press, linotype machines, and other machinery necessary to get out a daily paper, and of office furniture and fixtures. The press was the largest piece of machinery. There was a battery of five one style of type Mergenthaler linotype machines, which were bought in 1897. The linotype machines were traded in for improved machines, one in 1916, one in 1920, one in 1922, and the others in 1923. All of those machines were in good working order and in regular use when disposed of. The press was traded in for a new one several times between 1900 and the present time, but this was for the purpose of taking care of the increased circulation and advertising, and also to turn out more papers in the shortest possible time. All the machinery was kept in good repair and was run for only a few hours each day. In publishing a morning paper it is essential that it go to press as late as possible so as to include the latest news items. The presses and linotype machines have a useful life of thirty-three years. The office furniture consisted of desks, tables, chairs, typewriters, rugs, and other office equipment. The typewriters would last for two or three years. The furniture has been used for twenty-five years and is in good condition.

As shown by Davis's books from 1890 to December 31, 1907, the plant and equipment received by the plaintiff cost $49,054.70, depreciated at 3 per cent, amounting to $10,336.27, leaving a balance of $38,718.43, and the furniture received by the plaintiff cost $7,699.37, depreciated at 4 per cent, amounting to $2,636.64, leaving a balance of $5,062.73. The plant and equipment and the furniture were included in the plaintiff's invested capital at $26,383.48, the amount of stock issued therefor. The total cash value of the two items on December 31, 1907, was $43,781.16. A depreciation rate of 3 per cent on the machinery and equipment and a depreciation rate of 4 per cent on furniture is reasonable and should be used in depreciating the machinery and furniture, respectively, subsequent to January 1, 1908. The cost of additions to these two items since January 1, 1908, is not in dispute.

Davis transferred to the plaintiff the circulation structure of the Daily Pantagraph. It was property crucial to the

plaintiff's business, without which it would not have made any profits. It had been built up over a period of many years, and the plaintiff could not have acquired from anyone else the equivalent of this asset essential to the publication of its paper in Bloomington. Had the plaintiff attempted to build up a circulation, it would have required a large expenditure of money over a period of years. The productivity of the entire property is dependent upon the circulation, and the longer a circulation has been established the greater is its earning power. The cost of building a circulation structure is from $10 to $15 per unit or subscriber. Prior to the incorporation Davis audited his circulation and subsequent to January 1, 1908, the plaintiff has audited its circulation regularly just as the accounts receivable have been audited. These audits have been submitted regularly to the Auditors Bureau of Circulation, a newspaper publishers' organization. On the basis of this audit newspaper men determine the value of circulation structures. The circulation structure is recognized as an income-producing factor separate from the building and plant used in publishing a paper and it is sold by newspaper men for substantial sums of money. Advertising rates are dependent upon circulation. On December 31, 1907, the circulation of the Daily Pantagraph was 14,204 and had a value of $10 per unit, or $142,040.

Davis transferred to the plaintiff his Associated Press membership and news service, which gave exclusive rights to the Associated Press service for a morning paper, daily and Sunday, in Bloomington and territory tributary thereto. The membership could not be taken away except by the act of the member surrendering it or by violating its terms. The association had a well-established and efficient news-gathering organization covering the entire world. It was essential that the Daily Pantagraph, being the only morning paper, publish news from world-wide sources. At the time the plaintiff was incorporated this news could not have been secured from any other source, and without such news the plaintiff could not have maintained the large circulation which it had acquired. The Associated Press, a cooperative association, sold news only to its members, at cost. The plaintiff could not have acquired the membership from any-

one other than Davis. In the purchase and sale of newspaper properties such membership is regarded as having a substantial value, and in practice the value is determinable. In 1907 the Associated Press service was more valuable than it is at the present, for at that time there was no other source of supply of the news, whereas at the present time there are a number of such services. The news service which it furnishes, where it is an exclusive right, as in this case, is in this community worth one dollar for every head of a family in the territory served by the paper, and in this instance it was worth $30,000.

Davis transferred to the plaintiff the good will of the Daily Pantagraph. The paper had been published for more than fifty years in a well-settled agricultural community where there was little fluctuation of population; it had the confidence of its readers and was influential in the community. The paper had well-established advertising connections and advertisers had become convinced of its value as an advertising medium, because of the standing and reputation which it had achieved. It had a good will which gave the business a strong income-producing power. Newspaper men in purchases and sales give to good will a value over and above the other properties. The paper has been served to the same families for succeeding generations, and the good will had a value of $25,000 on December 31, 1907.

Summarizing the foregoing, it is found that the plaintiff's capital structure as of January 1, 1908, was as follows:

Tangible properties paid in for stock		$80, 000. 00
Tangible properties paid in and originally entered upon the books as paid-in surplus	$4, 532. 33	
Additional cash value of land	5, 000. 00	
Additional cash value of buildings	17, 000. 00	
Additional cash value of plant and equipment	17, 397. 68	
Cash value of newspaper circulation structure	142, 000. 00	
Cash value of Associated Press news service	30, 000. 00	
Cash value of newspaper good will	25, 000. 00	
Total paid-in surplus		240, 930. 01
Total capitalization		320, 930. 01

For its fiscal year ended October 31, 1916, the plaintiff filed its income-tax return with the proper collector on December 30, 1916. The commissioner's deficiency letter was issued and mailed on March 14, 1925.

III. The parties agree and the court finds that the land and depreciable capital assets of the taxpayer and the depreciation thereon in this case are to be taken as shown by Exhibit G attached to the petition herein, which exhibit is made part hereof by reference, except that the depreciation on the building is to be computed at 1.8 per cent instead of 1.5 per cent.

IV. The parties further agree and the court finds that—

Of circulation there can be, and in practice is, kept a record showing the number of units thereof which the publishing concern has from time to time, and this plaintiff kept such a record.

Circulation can be, and in practice is, and has been for many years, audited as to quantity and quality by auditors, and the circulation of this plaintiff was so audited.

Circulation can be, and in practice is sometimes, sold separately from the other property of the seller in cases wherein the seller quits the publishing of a paper or an edition thereof.

V. The parties further agree and the court finds that—

(A) The commissioner deemed the income and profits taxes, paid in a given year on the income of the preceding year, to have been paid out of January 1 surplus of the year of payment, and thus reduced that part of invested capital consisting of January 1 surplus, the reductions made by him being prorated out, as shown by said Exhibit 1, in accordance with regulations then in effect, in the following amounts for the following years:

1918 capital	$3, 017. 62
1919 capital	8, 745. 90
1920 capital	13, 535. 42
1921 capital	15, 420. 89

The defendant does not admit that such reduction of statutory capital was illegal; but defendant does admit that if, by reason of the decision of other points, there is a reduction of the taxes as determined by the commissioner there will

have to be made reductions in said amounts to bring them into harmony with the correct amounts of taxes.

Before it can be known what, if any, corrections will have to be made in said figures it will be necessary to have this court's decision of the question whether or not there can be used as a part of statutory capital intangibles coming to the plaintiff as a gratuity, and the question whether or not circulation is tangible or intangible property. When the various points shall have been decided by this court the parties will agree upon and submit to the court the revised figures to be placed in the above schedule or will submit to the court for settlement any differences between them in respect to said figures.

During all the years here involved the plaintiff's books were kept and its returns made on the accrual basis. The Federal income and profits taxes were not accrued on its books and were not entered thereon until paid and were then entered in the amounts paid.

(B) The commissioner made reductions from the plaintiff's capital, by reason of dividends paid, by applying the following process: Accruing against the income of the year of dividend payment estimated taxes on that income which were not deductible in ascertaining that income for tax purposes; assuming the balance of the income to have come in evenly during the year; applying to a given dividend the amount of current earnings found according to this process to be on hand at the time of dividend payment, and treating the balance of the dividend to have been paid out of January 1 surplus. This process was applied also to dividends paid after the first sixty days of the year. By this process the commissioner reduced the taxpayer's invested capital, as shown in Exhibit 1, by the following amounts:

1917 capital	$18, 869. 96
1918 capital	3, 649. 31
1919 capital	14, 875. 36
1920 capital	29, 412. 48
1921 capital	8, 858. 30

The defendant does not admit that such reduction was illegal; but defendant does admit that if, by reason of the decision of other points, there is a reduction in the taxes as

ascertained by the commissioner affecting this situation, the above figures will have to be reduced so far as necessary to bring them into harmony with the correct amounts of taxes.

Before it can be known what, if any, corrections will have to be made in said figures it will be necessary to have the decision by this court of the questions above mentioned. When the court has determined the various questions the parties will agree upon and submit to the court the correct figures to go into the above schedule or will submit to the court any differences between them as to such figures.

(C) The commissioner in determining the plaintiff's invested capital excluded therefrom certain claimed overpayments of taxes claimed by the plaintiff to have been made, and he also excluded certain claimed underpayments of taxes which he claimed were owing by the taxpayer, the resultant exclusions being as follows:

Claimed overpayment	$12, 418. 96
Overpayment per commissioner	9, 046. 15
Difference excluded from 1919 capital	3, 372. 81
Claimed overpayment	6, 820. 84
Claimed underpayment per commissioner	2, 120. 49
Total excluded from 1920 capital	8, 941. 33
Claimed overpayment	18, 959. 58
Claimed underpayment per commissioner	2, 915. 63
Total excluded from 1921 capital	21, 875. 21

The defendant does not admit that said exclusions from capital were illegal; but defendant does admit that if, by reason of the decision of the other points, the taxes are reduced, the above figures will have to be reduced to bring them into harmony with the correct taxes.

Before it can be known what, if any, corrections will have to be made in said figures it will be necessary to have the decision by this court of the questions above mentioned. When the court has determined the various questions the parties will agree upon and submit to the court the correct figures to go into the above schedule or will submit to the court any differences between them as to such figures.

GREEN, *Judge*, delivered the opinion of the court:

The defendant sets up objections to the jurisdiction of the court in this case, both as to the whole thereof and especially to some specific portions. It will be necessary to first consider these objections.

It is urged on behalf of the defendant that taxes paid for the years 1917 and 1918 may not be recovered because plaintiff was granted a special assessment for those years, and it is also asserted in argument that plaintiff was accorded and accepted the benefits of the application of the special assessment provisions of the revenue acts of 1917 and 1918. We do not think this contention is well founded.

Plaintiff was granted a special assessment for the years 1917 and 1918, and this resulted in an overassessment of $4,067.78 for the fiscal year ending October 31, 1917, an overassessment of $2,741.99 for the two months' period of November and December, 1917, and a deficiency of $11,724.97 for the calendar year 1918. The overassessments for the fourteen months' period ending December, 1917, were credited against the deficiency for the calendar year 1918 and the balance of $4,915.20 was paid by the plaintiff on July 26, 1921. If this were all on this point the decision in the case of *Williamsport Wire Rope Co.* v. *United States*, 277 U. S. 551, might possibly be conclusive as against the plaintiff; but subsequently the commissioner sent plaintiff a sixty-day letter dated March 14, 1925, giving his final determination of tax liability of the plaintiff which was based on the taxpayer's statutory capital instead of the special assessment hereinabove referred to and which resulted in an overassessment of $2,639.18 for the year 1917 and a deficiency tax amounting to $3,243.33 for the year 1918 instead of the amounts which had heretofore been determined by him under the provisions for special assessment. There is nothing in the evidence to show that the defendant attempted to collect the deficiency so assessed for the year 1918, nor is there anything to show that the plaintiff ever asked for the special assessment. The mere fact that plaintiff paid the amount which was demanded by defendant after the special assessment and before the deficiency letters were sent does not

show an acceptance by the plaintiff of the rulings of the commissioner under the special assessment provisions. In fact, neither party seems to have rested its case on these proceedings, and we think there was nothing in connection therewith which would prevent the plaintiff from maintaining this suit with reference to the alleged overpayment for the years 1917 and 1918.

Counsel for defendant contend that the statute of limitations has run against the claims for refund of taxes paid for the years 1917 and 1919 and a portion of the year 1918, for the reason that plaintiff's claims for refund thereof have not been rejected. With reference to these refunds, the Commissioner of Internal Revenue wrote certain letters to plaintiff in each of which he said: " Your claims will be rejected." Counsel for defendant argue that this expression referred to the future and not to the time of sending the letters, but we think this language would be understood to mean that the commissioner had definitely rejected the claim for refund referred to respectively in the letters.

It is also contended on behalf of the defendant that this court has no jurisdiction to entertain this suit, because at the time that the plaintiff's petition was filed an action involving some or all of the same matters was pending before the Board of Tax Appeals. The evidence shows that the plaintiff filed a petition appealing from certain deficiencies for 1919, 1920, and 1921, asserted by the Commissioner of Internal Revenue in a letter of March 14, 1925. The case was tried by the board on November 16, 1925, and the 1926 revenue act therefore has no application. It may be that while plaintiff's petition and action were pending before the Board of Tax Appeals, it had no right to bring a suit in this court including any of the matters involved therein, but the proceedings before the Board of Tax Appeals have reached a final determination. We do not find it necessary to determine whether when plaintiff's petition was filed in this case defendant might have successfully demurred thereto on the ground of the pendency of the proceedings before the Board of Tax Appeals. It is sufficient to say that we think that the proceedings before the board having ended, the plaintiff

is now in a position to maintain this suit and should not be required to go through the useless proceedings of filing a new petition. The objections of defendant to the jurisdiction of the court are therefore overruled.

Coming now to the merits of the action it will be found that the facts in the case are not in dispute and are clearly set forth in the findings. The parties have agreed that when the court decides the issues of law they will present to the court an appropriate finding containing proper tax computations based on the court's construction of the law. This renders it unnecessary that we should state anything more of the facts in the opinion than such as are necessary to an understanding of the questions of law which are to be decided.

1. The first question arises over the action of the commissioner in refusing to allow the plaintiff to include in its invested capital the value of its circulation. It appeared that when the plaintiff was organized as a corporation and took over the business of publishing a newspaper nothing was paid the former owners for the circulation, which was actually worth $142,000. The question is whether plaintiff had the right to include in its invested capital the value of this circulation thus gratuitously received.

Section 326, both of the 1918 (40 Stat. 1092) and 1921 revenue acts (42 Stat. 274), defines and limits the words "invested capital" as used in the law, and as a distinction is made therein between tangible and intangible property it becomes necessary to determine whether circulation or circulation structure is tangible or intangible property.

We have no doubt that it is intangible property. It is something that goes with every newspaper or periodical, and yet it can not be touched or perceived, although it may be described and to a certain extent specified. The contention on the part of plaintiff is that because its value can be ascertained, it is in fact a tangible asset, but this feature pertains to most intangible property. Section 325 of the acts of 1918 and 1921 provides that "intangible property" "as used in this title" (invested capital) means, among other things, "good will * * * and other like property." Circulation is very much in the nature of good will. Its amount and

value depend entirely on how attractive a publication is to the public and whether they have such an opinion in regard to it that they are likely to continue their subscriptions and their advertising. Unlike tangible property, it can not be parted or divided. It has all the characteristics that belong to other intangible property.

The section of the revenue acts of 1918 and 1921 before referred to (sec. 326) provides in substance that "intangible property bona fide paid in for stock or shares" may be included in invested capital under certain limitations and to a certain extent. Under well-known rules of construction the inclusion of intangible property paid in for stock or shares would exclude that which was not paid in for such purpose unless there was something in the context to indicate a different construction. An examination of the section tends rather to support the application of the rule. Strict limitations are placed by the statute upon the extent to which intangible property "paid in for stock or shares" may be included in invested capital. In no event can it be more than "(a) the actual cash value of such property at the time paid in, (b) the par value of the stock or shares issued therefor, or (c) in the aggregate 25 per centum of the par value of the total stock or shares of the corporation outstanding * * *, whichever is lowest." The plaintiff contends that as subdivision (3) of the section under consideration provides for the inclusion of "paid-in or earned surplus and undivided profits," this provision would include circulation value as a part thereof. Possibly by itself and alone this language might be so construed, but if the contention of the plaintiff should be sustained, the effect is to hold that Congress carefully limited the extent to which intangible property actually paid for stock could be included in invested capital, but placed no limitations whatever on intangible property gratuitously received, which would under this contention have to be included in invested capital at its full value, while the amount of intangible property which was actually used as a payment could not exceed 25 per centum of the par value of the total amount of stock of

the corporation. We do not believe that Congress so intended, and in arriving at this conclusion we are guided not simply by the fact that this result would be absurd. When Congress provided that intangible property paid in for stock might be included in invested capital and went on further to specify the extent and limitation thereof, if it had intended that property gratuitously received might also be included, it would not merely have so specified but it would have gone on to fix the limit and extent to which it could be so included in the same manner as it did with intangible property actually paid in for stock. This would be the natural, ordinary, and usual course. We conclude that the maxim *expressio unius est exclusio alterius* applies, and subdivision (3) was not intended to include in invested capital intangible property gratuitously received. The Board of Tax Appeals has in a number of cases consistently adhered to this construction of the law, and in accordance with the views above expressed we hold that plaintiff is not entitled to include in its invested capital the value of its circulation. It is true that in this particular case the application of this rule produces an inequitable result as compared with a similar case where the value of the circulation had been treated as a payment for stock, but it should be always borne in mind that it is utterly impossible for Congress to adjust taxes so as to equalize all of the myriads of different cases which may arise. Some inequalities will always exist and in the taxes which are most commonly and universally applied they are very numerous, and in some instances gross. The case presented by plaintiff is a very unusual one. Possibly if it had been considered by Congress that such a case could ever occur, it would have provided for it, but it did not, and we can only administer the law as we find it.

2. During the years involved the plaintiff's books were kept and its returns made on an accrual basis. The Federal income and profits taxes were not accrued on its books and were not entered thereon until paid and were then entered in the amounts paid. The commissioner in computing invested capital for a given year deducted from the amount of the invested capital at the close of the preceding year the amount of income and profits taxes for such preceding year.

The question is whether this action was in accordance with law.

We have already passed on this question in *American Bronze Powder Manufacturing Co.* v. *United States*, 67 C. Cls. 564, and held that the action of the commissioner was proper. This decision was made on the authority of *United States* v. *Anderson*, 269 U. S. 422, and we would not consider it necessary to again consider it if a contention was not made in argument that a rule is laid down in *United States* v. *Woodward*, 256 U. S. 632, which is contrary to the opinion expressed in the *American Bronze Powder Manufacturing Co. case*, *supra*.

In the *Anderson case*, *supra*, it is said:

"In a technical legal sense it may be argued that a tax does not accrue until it has been assessed and becomes due; but it is also true that in advance of the assessment of a tax, all the events may occur which fix the amount of the tax and determine the liability of the taxpayer to pay it. In this respect, for purposes of accounting and of ascertaining *true income for a given accounting period*, the munitions tax here in question did not stand on any different footing than other accrued expenses appearing on appellee's books. In the economic and bookkeeping sense with which the statute and Treasury decision were concerned, the taxes had accrued." (Italics ours.)

It is true that in the *Woodward case*, *supra*, where the estate tax was being considered, language was used which seems to have been understood by some as meaning that a tax accrued in the year in which it was paid, but this language was explained and qualified in the case of *United States* v. *Mitchell*, 271 U. S. 9, and also in the *Anderson case*. In both of these cases it was shown that the question of when a tax accrued was not before the court in the *Woodward case*, and that the opinion rendered therein did not pass upon that question. Counsel for plaintiff is a little unfortunate, to say the least, in quoting from the *Anderson case* what the court says with reference to the *Woodward case*.

The court said:

"It did not appear whether, as here, the taxpayer kept his books on the accrual basis * * *."

Opinion of the Court

In quoting from the *Anderson case* the sentence in which this language appears counsel omits it, although it is controlling on the question to be decided herein as the books in the case at bar were kept on the accrual basis.

It is argued on behalf of plaintiff that in the *Anderson case* and the *Yale & Towne Mfg. Co. case*, which were decided together, the munitions tax and not the income and profits tax was involved; and that the munitions tax could be computed and ascertained in the year for which it was levied, while the income and profits tax can not. There are two reasons why this argument is not tenable: First, that the munitions tax could not be exactly computed until the taxable year was completed and over; and the other and perhaps more conclusive reason is that the Supreme Court did not base its decision upon any such premise, but stated, as above recited, that "the munitions tax here in question did not stand on any different footing than other accrued expenses appearing on appellee's books," which accrued expenses where books were kept on the accrual basis, as in the instant case, would be charged at the different times in the year when they arose.

In the case of *Nichols, Collector*, v. *Sylvester Co.*, 16 Fed. (2d) 98, it was held, following the doctrine of the *Anderson case*, that where the corporation kept its books on an accrual basis the munitions tax for the year 1916, paid in 1917, was a proper deduction for the year 1916; and in *Bowers, Collector*, v. *Max Kaufmann & Co.*, 18 Fed. (2d) 69, the rule of the *Anderson case* was applied to the taxes for 1917, due and payable in 1918. The *Bowers' case* involved the excess-profits tax.

It should be carefully kept in mind that the point here discussed is exactly the same as that involved in the *Anderson case*, namely, whether when a corporation keeps its books on the accrual basis, in computing the taxes for a given year, the taxes of the previous year should be deducted in ascertaining the amount of invested capital, and the Supreme Court held that such a deduction should be made. The nature of the facts also is exactly the same with one exception. In the *Anderson case* the taxpayer "deducted from gross income all the items appearing on its books as losses sus-

tained and obligations and expenses incurred during the year" and likewise carried on its books as an obligation or expense a "reserve for munitions taxes" for 1916, being the year for which such taxes were imposed, but in making up its return for 1916 the taxpayer omitted to return the item of the munitions tax. In the case at bar the plaintiff, keeping its books on the accrual basis followed the same plan, except that the Federal income and profits taxes were not accrued on its books and were not entered until they were paid. The argument of plaintiff seems to be based on the theory that plaintiff's income for taxing purposes should be computed on the cash receipts and disbursements basis. This argument seems strange in view of the fact that the plaintiff not only kept its books on an accrual basis but *made its returns on an accrual basis.* It took credit on its books not only for items actually received but also for credits which had accrued although they were payable in the future. Having thus received the benefit of credits which had accrued, the plaintiff should also deduct the amount of obligations which had been incurred. In our opinion, the plaintiff could not keep its books as to everything except taxes on the accrual basis and then refuse to have its taxes adjusted on that basis because it omitted to enter them on the books until paid, nor could it make a return on an accrual basis as it undertook to do without including its accrued taxes. We think it clear under the holding made in the *Anderson case* that the commissioner was right in deducting the income and profits taxes of the previous year in order to ascertain invested capital of any given year, the plaintiff having kept its books on an accrual basis.

3. In determining the amount of income available for the payment of dividends paid after the first sixty days of a given year, the commissioner reduced the net available income earned from January first of the given year to the extent of the pro rata amount of Federal income and profits taxes for that year, which he held had accrued up to the date of dividend payment. The question is whether this action of the commissioner was correct.

This identical question has now been passed upon by this court in three cases, and in all of them the conclusion was

adverse to the contention of plaintiff. These cases are *Franklin D'Olier et al.* v. *United States*, 61 C. Cls. 895; *Child and Fullerton* v. *United States*, 63 C. Cls. 356; and *American Bronze Powder Mfg. Co.* v. *United States*, 67 C. Cls. 564.

The *D'Olier case*, *supra*, was decided on the authority of *United States* v. *Anderson*, *supra*, and the opinion therein expressly so stated. The plaintiff applied for a certiorari and his application was denied. The *Child and Fullerton case* was abandoned on the denial of certiorari in the *D'Olier case*. We are aware that there are decisions to the contrary by other courts and that the Board of Tax Appeals has also held consistently to the contrary, but only by reversing the decisions of this court in the three cases named above and holding contrary to a doctrine which we consider has been approved by the Supreme Court could we reach a conclusion that the action of the commissioner was erroneous and wrongful. It is true that the opinion in the *D'Olier case* merely stated that it was made on the authority of the *Anderson case*, but the statement of facts and the point involved were made so clear that it was hardly possible that the issue be misunderstood. In the *American Bronze Powder Mfg. Co. case*, *supra*, we have set out at length our reasons for holding that where the books were kept on an accrual basis the commissioner was authorized to deduct the amount of the tentative tax for the year in which the tax was imposed in order to ascertain the amount available for dividends, and in the last-named case we quoted as determinative of the question before the court a statement made in the *Anderson case*, as follows:

"The appellee's true income for the year 1916 could not have been determined without deducting from its gross income for the year the total cost and expenses attributable to the production of that income during the year."

It appears to us there can be no question but that the taxes imposed for any given year are a part of the cost and expenses attributable to the production of income during the year. In fact, no one would dispute but that every going concern includes taxes as a part of its cost and expenses.

The question here is as to when the taxes should be deducted, and following the *Anderson case* we hold that the only way to find the plaintiff's true income for a given year was to deduct the estimated amount of the tax.

In the *Anderson case* also a Treasury decision was approved under which it was permissible for "corporations which accrue on their books monthly or at other stated periods amounts sufficient to meet fixed annual or other charges to deduct from their gross income the amounts so accrued, *provided such accruals approximate as nearly as possible the actual liabilities for which the accruals are made*, and provided that in cases wherein deductions are made on the accrual basis as hereinbefore indicated, *income from fixed and determinable sources accruing to the corporations must be returned, for the purpose of the tax, on the same basis.*" (Italics ours.)

Objections have been made to the method adopted by the commissioner on the ground that it was complicated and it has been compared with an "algebraic formula." We have had occasion to apply the method in several cases. It has its complications but no more we think than those caused by some other provisions of the law with reference to the excess-profits tax which has been repealed for several years. Regardless of the complications, if it is in accordance with law we should apply it. In this connection it ought to be said that *Edwards* v. *Slocum*, 264 U. S. 61, has no application. In that case the Government was seeking to apply the estate tax by a very complicated method to what the Supreme Court held was not the net estate and which the court held included a portion of the estate not subject to the tax. No such question arises in the instant case.

It is also said that the method is unfair to the taxpayer who happens to keep his books on the accrual basis, but when the taxpayer has been receiving benefits in the way of including accrued credits and earnings out of which dividends might be paid, we are unable to see why taxes which have accrued should not be deducted pro rata and think this is only fair to the Government.

The parties having agreed that they will present to the court a computation of the amount to which plaintiff is

entitled under the conclusions of law expressed in the opinion of the court and the undisputed facts in the case, an opportunity will be given to present to the court such a computation for the purpose of having judgment entered herein in accordance with the opinion.

SINNOTT, *Judge*, and BOOTH, *Chief Justice*, concur.

GRAHAM, *Judge*, took no part in the decision of this case; and MOSS, *Judge*, took no part on account of illness.

On January 13, 1930, the court gave judgment for $3,697.04, with interest on $3,460.18 from June 15, 1918, and on $236.86 from August 19, 1922.

CHESAPEAKE & POTOMAC TELEPHONE CO. v. THE UNITED STATES[1]

[No. A-233. Decided June 10, 1929]

On the Proofs

Dent Act; telephone service in Washington; loss on War Department switchboard.—Where in plaintiff's contract with the Secretary of the Treasury, made under section 4 of the act of June 17, 1910, for telephone service for the Government in Washington, there is no provision for special payment to cover the loss sustained on an investment in a switchboard installed in 1918 to accommodate increases in business due to the war, and plaintiff sues under the Dent Act to recover such loss, the plaintiff must prove the existence of a separate agreement, implied in fact, to make such payment, by a representative of the Government having authority, and where such proof fails the plaintiff can not recover.

The Reporter's statement of the case:

Mr. Stanton C. Peelle for the plaintiff. *Peelle, Ogilby & Lesh* were on the briefs.

Messrs. Heber H. Rice and *J. J. Lenihan*, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

[1] Certiorari granted.

This case was originally decided February 20, 1928. On plaintiff's motion for new trial certain amendments to the findings were made, and the special findings of fact as so amended follow:

I. The Chesapeake & Potomac Telephone Company, plaintiff, is a corporation organized and existing under the laws of the State of New York, maintaining its offices and conducting its business as a telephone company in the District of Columbia, and at all times hereinafter mentioned was, and now is, so engaged in the conduct of said business in the District of Columbia.

II. On June 23, 1916, plaintiff entered into a contract, known as the General Supply Committee contract, with the Secretary of the Treasury, who was exclusively authorized by law to make such contracts (section 4, act of June 17, 1910, 36 Stat. 468, 531), which provided for the telephone service to be furnished by plaintiff to the various departments, offices, and establishments of the Government in the District of Columbia, for the fiscal year ending June 30, 1917. On May 18, 1917, the same parties entered into a similar contract providing for like telephone service for the fiscal year ending June 30, 1918. The chief revenue received by plaintiff from the War Department under the annual General Supply Committee contracts consisted in mileage charge upon station lines, charges for telephone stations, and local messages. Plaintiff furnished the necessary private branch exchange switchboards at a nominal rental of $24 per annum, it being the policy of the plaintiff to charge merely a nominal rental for such equipment, while the chief revenue was being derived from other sources. The Government at all times paid the wages of the operators at the War Department switchboard.

III. In the renewal of the General Supply Committee contracts for the year beginning July 1, 1917, the following provisions were contained:

"For and in consideration of the payments to be made as hereinafter provided for, the party of the first part (C. & P. Telephone Company) does hereby covenant and agree to and with the party of the second part (Secretary of the Treasury

of the United States) that said party of the first part will, at its own risk and expense, furnish telephone service to all, any, or either of the departments or other offices or establishments of the Government in the District of Columbia, for a term of one year beginning July 1, 1917, and ending June 30, 1918, at the following rates:

"*Item 20000.*—That said company will install, equip, and maintain such telephone equipment as may be required in the District of Columbia, and furnish service in connection therewith at the following rates during the fiscal year 1918:

"(*a*) Common battery private branch exchange switchboards, including one operator's set of telephones for each operator's position, each, per annum, $24.00.

"*Item 20200.*—At the request of the department the company will change the location of switchboards or telephone stations of a No. 2 private branch exchange system, charging the department therefor the cost of material, labor, transportation of employees, and supervision. Any changes in the location of switchboards which the company may make for its own convenience or in the renewal of equipment will be done without cost to the department.

"*Item 20350.*—Should additional service or equipment be required by any of the departments or establishments of the Government such additional service or equipment will be furnished at the rates named herein. Should any of the departments or other establishment of the Government discontinue the use of any equipment or service, a like reduction will be made from the date such equipment is discontinued, provided the company is given not less than 10 days' notice of the purpose to discontinue."

The above provisions were the same as the corresponding provisions in the General Supply contract for the previous year ending June 30, 1917.

IV. On September 25, 1918, the Secretary of the Treasury entered into a contract with plaintiff, prepared by the General Supply Committee, for telephone service for the fiscal year beginning July 1, 1918, which contained, among other things, the following provisions:

"The company does hereby covenant and agree to and with the subscriber that the company will, at its own risk and expense, furnish telephone service to all, any, or either of the departments or other offices or establishments of the Government in the District of Columbia for a term of one

year beginning July 1, 1918, and ending June 30, 1919, at the following rates:

"The company will install, equip, and maintain such telephone equipment as may be required by the subscriber in the District of Columbia, and furnish service in connection therewith at the annual rates indicated opposite each item during the fiscal year ending June 30, 1919: * * *

"*Item 20000*.—Private branch exchange system:

(a) Switchboards:	
(1) Common battery private branch exchange switchboards, including one operator's set of telephones for each operator's position, limited to twenty station drops	$24.00
(2) For subswitchboards furnished in connection with private branch exchange service in the same building or on the same Government reservation with the main switchboard for use in providing night service, etc., with 1 operator's set of telephones for each operator's position, viz—	
(*aa*) Cordless switchboard with a capacity of 3 trunk lines and 7 stations, with operator's set	24.00
(*bb*) Cord switchboard with a capacity of 10 trunk lines and 30 stations equipped with 20 station drops, with operator's set	24.00
(b) Telephone stations; includes interior wiring to connect stations with private branch exchange switchboards or subswitchboards, except when the installation is exceptionally expensive, due to unusual conditions, such as reinforced concrete buildings, etc., or when the system is not likely to be reasonably permanent, in which cases an installation charge will be made:	
(1) For first 10 telephone stations, each	6.00
(2) For second 10 telephone stations, each	4.80
(3) For telephone stations in excess of 20, each	3.60
(4) For station terminal equipment at the private branch exchange switchboard, in excess of 20 drops, each	1.20

"Should additional service or equipment be required by any of the departments or other establishments of the Government such additional service shall be furnished at the rates named herein, or at the rates in effect at the time such additional service or equipment is provided.

"Should the subscriber desire any other service or equipment not specified herein, the company's rates and regulations filed with the Public Utilities Commission of the District of Columbia will apply.

"Should any of the departments or other establishments of the Government discontinue the use of any equipment or service within the period of one month from the date of its installation, the minimum charge for such equipment or service shall be for the period of one month at the rates applicable thereto.

"The Secretary of the Treasury, by accepting rates and terms herein stated on behalf of the subscriber, agrees that the equipment now in service is covered by this contract."

Reporter's Statement of the Case

V. Under the authority of the act of March 4, 1913, the Public Utilities Commission, thereby created, adopted schedules of rates to be charged for telephone service and equipment in the District of Columbia, thereafter modifying certain of said rates from time to time, as the commission deemed proper. The annual charge for a private branch exchange switchboard, including operator's set of telephones, was fixed by the aforesaid commission at $24 throughout the period involved in this claim.

Sheet No. 4, Tariff No. 22, in force from June 1, 1916, to June 30, 1923, provided:

"RATES FOR EQUIPMENT NOT OTHERWISE PROVIDED FOR

"When a subscriber desires a type of equipment for which provision is not otherwise made, a rate will be quoted based on the initial cost of such equipment, the installation charge, and the estimated cost of maintenance."

There was also in effect from February 1, 1916, to June 30, 1923, a tariff or rate schedule of the commission which provided, in reference to private branch exchange systems:

"When the installation is exceptionally expensive, due to unusual conditions, such as reinforced-concrete buildings, etc., or when the system is not likely to be reasonably permanent, an installation charge is made."

VI. In June, 1908, plaintiff had installed a special three-position multiple private branch exchange No. 4 switchboard for the War Department, in room 245 of the State, War, and Navy Building at Washington, D. C. Said switchboard was equipped for 280 lines, 20 trunks, and 30 tie lines; and when it was installed, about 180 lines were put into service. In February, 1917, the number of lines had not increased to more than 257, and this private branch exchange switchboard had continued to be sufficient to supply the War Department with telephone service from June, 1908, to February, 1917.

VII. Due in part to the Mexican border troubles and more especially following the announcement by the German Government on January 31, 1917, of its policy with respect to unrestricted submarine warfare and the necessary pre-war activities of the United States Government that followed

this announcement, the telephone service handled through this switchboard continued to increase in such proportion that additional switchboard equipment was required. To meet this demand for increased facilities a five-position multiple No. 4 private branch exchange switchboard was installed for the War Department in the same room and put into service on March 23, 1917, replacing the three-position switchboard theretofore in service.

VIII. The requirements of the War Department for telephone service continued to increase rapidly, so that in August, 1917, it was necessary to install four additional positions of multiple No. 4 private branch exchange switchboard, making a total of nine positions. Before these four additional positions were installed, however, it became evident to the plaintiff that the War Department's need for telephone service would exceed the capacity of the No. 4 multiple type of private branch exchange equipment, and accordingly plaintiff ordered a private branch exchange equipment of the No. 604 type, the largest and most modern type of private branch exchange equipment then on the market. The initial installation of this No. 604 type private branch exchange equipment consisting of 12 operators' positions, with equipment for 1,000 lines, was installed in rooms 241 and 243 in the State, War, and Navy Building and placed in service on October 1, 1917, replacing the nine positions of No. 4 switchboard in room 245.

IX. The War Department's requirements for telephone service continued to grow, and accordingly additions were made to the No. 604 private branch exchange equipment, so that by November 1, 1917, it had been increased to 15 operators' positions, with equipment for 1,300 lines; by December 15, 1917, to 18 operators' positions and 1,600 lines; and by January 9, 1918, to 20 operators' positions and 2,000 lines, the normal capacity of the equipment. It then became necessary to crowd additional equipment into the switchboard until the lines had been increased to 2,400 with a corresponding increase of operators' positions, and then to resort to the expedient of providing other operators' positions for local trunking, thus making it necessary for a large proportion of

the local calls to be handled by two operators, which resulted in increased cost of operation to the Government, and in a less speedy and less accurate service. By such changes, this No. 604 type of private branch exchange equipment was expanded during the winter and spring of 1918 until it consisted of 42 operators' positions, including trunking positions, with equipment for 4,200 lines, thus making it a highly specialized private branch exchange switchboard. This was practically the limit to which this equipment could be expanded.

X. By November, 1917, the officers of the plaintiff company foresaw that, due to war conditions, the requirements of the War Department for telephone service were going to exceed the line capacity of the No. 604 private branch exchange equipment, and that it would be necessary to provide a switchboard equipment larger than that previously designed and used for the largest private branch exchange then existing.

XI. Plaintiff informed the officials of the War Department of this and of the floor space which would be required for such equipment, and for furnishing adequate telephone facilities for the department; but as no such space was then available, the Secretary of War appointed a committee to consider the space question. As a result, the War Department erected a separate building at No. 1723 F Street NW. to house the new equipment. The building was designed by an architect employed by the Government, the floor plans for which were submitted by plaintiff. The building was erected by a contractor employed by the Government. The Government paid for the erection of the building to the extent of $130,000, the plaintiff contributing the balance of about $8,000 to avoid any impairment in the construction.

Plaintiff had always theretofore provided at its own expense the necessary telephone switchboards and equipment for use at the War Department, and the defendant had always provided the necessary space for such switchboards and equipment.

XII. Honorable Newton D. Baker was Secretary of War at that time, and John C. Scofield was assistant to the Secretary of War and chief clerk of the War Department. Mr.

Scofield, in addition to his other duties, had supervisory charge with regard to civilian employees and assigning buildings and getting space for different activities; he also had supervisory charge of the estimates and expenditures from the appropriation "Contingent expenses of the War Department." At the beginning of the war he had supervision of the telegraph and telephone division, and ranked next to the Secretary of War in control of said service, and on December 18, 1917, Arthur D. Scovell, who had much experience as a traffic manager of the New York Telephone Company, which, together with plaintiff, were constituent members of the bell system, was appointed by the Secretary of War and assumed his duties as director of telephones for the War Department, having immediate charge of the telephone service and traffic of the department. He had administrative power inside the War Department, could make recommendations, had charge of the telephone employees, could switch them around and tell how to make their service effective, but had no power to bind the Government in the matter of contract and was not in any sense a contracting officer. Mr. Scovell was there to get the best service as quickly as possible, and the Secretary of War supported him in that. There were items of work or installations which were ordered for the telephone service of the War Department by Mr. Scovell while he was director of telephones, without any written order given at the time, but payments for which were subsequently made. Mr. Scovell was in immediate charge of the telephone service of the War Department, and this service was under the general direction of Mr. Scofield.

About the time of the beginning of the World War, plaintiff, anticipating an abnormal increase in the telephone business at the War Department, called its engineers together and planned to handle the prospective increase in business. Soon thereafter plaintiff asked the War Department for additional space in which to install telephone facilities. Plaintiff also secured said A. D. Scovell for the War Department, to become the Government's "dollar-a-year" man, in connection with the War Department's telephone service.

His salary, aside from said dollar a year, was paid by plaintiff or its associate, the New York Telephone Company, throughout his tenure of service from December 18, 1917, to November 14, 1918. Plaintiff had representatives from different American Telephone & Telegraph companies on hand in Washington to lend their assistance in cooperating with plaintiff and to assist plaintiff in procuring the switchboards and equipment. The said American Telephone & Telegraph companies considered the problem of increased telephone service at the War Department to be largely its own problem.

XIII. When, in November, 1917, the officials of the plaintiff foresaw the necessity of installing a larger type of switchboard if adequate telephone service was to be furnished to the War Department these officials conferred with Mr. Scofield and Mr. Scovell and also with the committee referred to in Finding XI as to the space and character of building which would be required to house it properly. The War Department decided to erect a separate building for the purpose, and plaintiff's officials cooperated with the War Department in the preparation of the plans for such building. As it was vital that the new telephone service should be provided at the earliest possible moment, plaintiff, as soon as the type of switchboard was tentatively determined upon, on or about December 27, 1917, ordered the manufacture of the stock parts for the exchange, such as multiple jacks and the like, which had to be made up by the thousands, but not such parts as might have to be changed or the order for which could not be canceled, if such tentative plans for such new switchboard were abandoned. Plaintiff also prepared blue prints showing the proposed floor plans and the location thereon to scale of the various parts of the proposed switchboard. These blue prints indicated the extensive character of the various parts of the equipment.

Mr. Charles T. Clagett, who was plaintiff's district manager at the time, had charge of its business office, looked after collections, the ordering of telephones, and all business pertaining to the public, including the Government's contractual relations with the plaintiff, consulted with plaintiff's

chief engineer, Mr. C. F. Sherwood, who had been sent down from the New York Telephone Company to take charge of the Government situation and to whom Mr. Clagett reported, and told him the whole installation ought to be held up until they got a written order. Mr. Sherwood objected to such a course, told Mr. Clagett that they wanted to do everything possible for the Government, and would take their chances of getting paid, and notified Mr. Clagett to go ahead with the installation. In January, 1918, plaintiff advised Mr. Scofield, and prior to installing the same gave a similar notice to Mr. Scovell, that it expected the Government to pay the cost of the new switchboard less salvage, but neither the Secretary of War nor Mr. Scofield at any time approved payment of the same.

The proposed central-office type of switchboard and equipment were approved orally by Mr. Scovell, who considered it the best to be had and the only switchboard and equipment which would meet adequately the needs of the War Department. In addition, plaintiff submitted to the Secretary of War blue prints showing, on the floor plans of the building which the Government proposed to erect, the switchboard and equipment, and location thereof, which plaintiff proposed to install therein. Plaintiff's letter of transmittal, addressed to the Secretary of War under date of December 31, 1917, said, in part:

"We will appreciate hearing from you at your earliest convenience, since in order to save time, we are having the factory proceed with the manufacture of the new War Department switchboard in accordance with the accompanying layout, and should any changes therefrom be desired, the factory should be informed at once."

On January 2, 1918, this letter was referred by Mr. Scofield to the cantonment division for consideration and report. The cantonment division, with the indorsement, "So far as can be determined, the arrangement as suggested by the telephone company is satisfactory," referred the same to Major Starrett, who, under date of January 14, 1918, wrote, returning the plans to plaintiff, with said indorsements, and saying, "To me the indorsements already made seem sufficient authorization for you to proceed." Thereupon plain-

tiff gave final orders for the completion of the proposed switchboard and equipment. These plans were submitted by plaintiff to the Secretary of War not only for the purpose of learning definitely the floor plans of the proposed building, but also for the purpose of securing approval of the proposed switchboard and equipment.

XIV. Plaintiff installed the new No. 1 switchboard and equipment in said new building, and transferred the telephone service from the old switchboard in the State, War, and Navy Building to the new switchboard in the new building, completing the installation and putting the new board into service on June 22, 1918. The new switchboard consisted of fifteen sections of three positions each, or forty-five operator's positions, serving about five thousand extension lines, 180 central office trunks, 140 tie lines, and 30 toll lines. By the time of the armistice, plaintiff had installed 30 additional operator's positions, with associated equipment.

An extension line is a line from a private branch exchange switchboard to one or more stations or telephones. A trunk line connects the central office with a private branch exchange, a tie line connects two private branch exchanges.

The new switchboard was larger, more costly, and had a much larger capacity than an ordinary private branch exchange switchboard. It was of the type installed in a central-office exchange. The board installed served 65 different buildings in the District of Columbia, located in various localities, where the War Department was housed. It had a complete power plant of its own and was of sufficient capacity to serve as a telephone exchange for a city of from 40,000 to 100,000 inhabitants. It was connected by direct tie lines with the switchboards of nearly all other Government departments, and also directly with points outside Washington, some as far away as Ohio, thus putting the department in direct communication, without going through the central office exchange, with all these points mentioned.

XV. After the signing of the armistice the War Department's need for telephones decreased and beginning in the

early part of 1919, upon the several orders of the War Department therefor, the plaintiff from time to time removed various sections of the new switchboard, until about the first of January, 1921, it was completely removed. Service for the War Department, upon discontinuance of service at 1723 F Street NW., was, by order of the War Department, furnished through the Navy Department switchboard.

XVI. In transferring the telephone service to the new building, plaintiff, on December 3, 1918, submitted to the War Department a bill for $35,917.05 net, stating that it covered the cost of the labor and material involved in accordance with the provisions of the General Supply Committee contract. This bill was paid by the War Department on December 13, 1918.

Plaintiff presented and collected its bills for rental upon both the old switchboard and the new switchboard at the same nominal rental of $24 per year for the switchboard proper, and increased rates for the lines and stations in the General Supply contract. An additional charge against the switchboard for multiple jacks was made, amounting to $10,153.56, and was paid to plaintiff by the War Department.

XVII. The new switchboard was larger and of a different type from the old switchboard (and the same may be said of all preceding switchboards), the purposes for which they were used were identical, being used as a private branch exchange switchboard. As to size, both were described as the largest private branch exchange switchboard in the United States. The cost of the new board exceeded the cost of the old board by about twenty-five per cent per position. Such features of the new switchboard as the power plant, batteries, dynamos, generators, and "A" and "B" boards, were also used in the old No. 604 switchboard in the State, War, and Navy Building. These boards possessed the same general features and were both common battery private branch exchange switchboards.

XVIII. Plaintiff was paid special increases in rates in accord with the rates fixed by the Public Utilities Commission of the District of Columbia, for telephone service from the Government for its general supply contract for the fiscal

year beginning July 1, 1918, which rates were continued during subsequent years. The revenue derived by plaintiff from new items inserted in said contract after the installation of the new switchboard and covering the period from July 1, 1918, to November 10, 1920 (during which time the new switchboard was in service), was $52,224 and the extra revenue derived from the 16⅔ per cent increase in the old mileage rates was $46,264, making a total of $98,488 for a period of less than 2½ years.

XIX. Plaintiff collected from the Government under the Government control agreement for the full year of such Government control ending July 31, 1919, an estimated annual carrying charge of 24.6 per cent of the book value of the switchboard, amounting to $78,939, less the nominal rentals actually received.

XX. The War Department did not recognize the claim of an agreement with plaintiff to pay for the switchboard other than by way of the usual rental provided for in the General Supply Committee contract.

Mr. Scofield never represented to plaintiff's representatives that the War Department would pay for the installation or costs of or losses on the new switchboard, nor did he prior to installation notify the plaintiff that he would not pay for same. Secretary of War Baker made no agreement with plaintiff to pay for the switchboard, never personally authorized such payment, never heard it suggested, and did not know until after the armistice that plaintiff contemplated submitting claim for the same.

XXI. At the close of the war the American Telephone & Telegraph Company contributed to the losses sustained by plaintiff on its telephone equipment installed for use in the Government service during the war, but soon thereafter discontinued, including the new switchboard in question. The American Telephone & Telegraph Company contributed $1,250,000 on December 31, 1919, to cover such losses, being set out in the minutes of its executive board meeting of December 17, 1919, and containing the following language:

"Whereas the Chesapeake & Potomac Telephone Company, one of said associated companies, whose plant is located largely within the District of Columbia, was compelled in

order to meet the late war emergency to make large and extraordinary expenditures on account of plant that would not have been otherwise necessary at this time or in the immediate future;

"And whereas, the necessity for such large and extraordinary expenditures arose out of the requirements of the telephone service of the entire Bell system, and not solely out of the requirements of the telephone service of the Chesapeake & Potomac Telephone Company;

"And whereas, upon the termination of such war emergency, no further necessity exists for much of the plant so acquired by the Chesapeake & Potomac Telephone Company, and it can not be presently utilized within its territory, so that the transaction involved a considerable loss to said telephone company;

"And whereas, equity requires that said loss, which was incurred in behalf of the entire Bell system, be not imposed wholly upon said Chesapeake & Potomac Telephone Company.

"*Resolved*, That this company participate to the extent of $1,250,000 in the loss so incurred * * *."

Such action was taken by said American Telephone & Telegraph Company while plaintiff's claim on account of said switchboard was pending before the Board of Contract Adjustment of the War Department.

XXII. The sum of $312,000 of said payments was so contributed to cover telephone equipment or plant which was under way at the time of the armistice, and which was soon thereafter abandoned. The remaining $938,000 was contributed to cover the ultimate net loss on plant which had been put into service prior to the armistice, but which plaintiff had planned to retire at a later date, the gross book value of which amounted to $1,849,929.14.

XXIII. While the said $1,849,929.14 represented the gross book value of the latter class of telephone plant, the actual net losses thereon amounted to less than $900,000, so that the sum of $938,000 set apart to cover such losses was more than ample to cover the actual losses on that equipment, among which items was listed the War Department's switchboard at $328,166.56, designated as "P. B. X., Case No. 20, War Department."

XXIV. The following revenue was received from the War Department during the period of service of the new switch-

board, by the Bell system, of which the American Telephone & Telegraph Company was the parent concern:

The total long-distance telephone tolls for calls emanating from the War Department amounted to $482,124.00, and the incoming long-distance calls and tolls were about equal to the outgoing calls and tolls, making a total of incoming and outgoing tolls of approximately $946,248.00, the bulk of which represents the long-distance revenue received by the Bell system through the instrumentality of the new switchboard, aside from the leased line rentals of $141,812.53 paid to the American Telephone & Telegraph Company by the War Department. Plaintiff received about 30 per cent of the gross amount of outgoing long-distance tolls, which would be $144,637.20. The remainder of the $946,248.00 plus $141,812.53, to wit, $943,423.33, was received by the American Telephone & Telegraph Company and its other subsidiaries of the Bell system, and other lines.

XXV. The gross revenue, exclusive of long-distance tolls, received by plaintiff from the War Department for telephone service under the general supply contracts for the fiscal year beginning July 1, 1916, and ending June 30, 1917, was $5,714.77; July 1, 1917–June 30, 1918, $85,809.41; and July 1, 1918–June 30, 1919, $338,824.60. In addition there was paid to plaintiff by the War Department the sum of $35,917.05, mentioned in Finding XVI, *supra*.

The gross revenue under the said contracts from the same source for the period the new switchboard was in service, June, 1918, to November, 1920, was $534,418.83.

XXVI. The Government was in control of the telephones of the United States for the period of one year ending July 31, 1919, under the contract between the Postmaster General and the American Telephone & Telegraph Company, and its subsidiaries, including the plaintiff herein. By this contract the Government was to and did reimburse these companies for the use of their plants and equipment to an amount over and above all expenses assignable to operation and maintenance, licensing revenue, and also depreciation, at the average rate of return on the stock for the three preceding years.

XXVII. In the final settlement under this contract the Government paid the American Telephone & Telegraph Company and its subsidiaries $9,290,170.31. The portion thereof received by plaintiff in this settlement was $1,322,-205.64, including 8% return on its stock for period of Government control, August 1, 1918, to July 31, 1919.

XXVIII. On May 19, 1919, plaintiff rendered the War Department a claim based upon the proportionate cost and estimated salvage of the thirty positions which had then been ordered removed. Thereafter, as fast as further positions were ordered removed and more accurate statements could be prepared, the claim was amended. The Secretary of War immediately referred the claim to the Board of Contract Adjustment, which held hearings thereon, on June 25, 1920, disallowed the claim in its entirety, and on July 20, 1920, denied an application for rehearing. An appeal was taken to the Secretary of War, who, on November 9, 1920, affirmed the decision of the board.

XXIX. The total cost to plaintiff of the new switchboard at 1723 F St. NW., and the associated equipment and of the installation thereof was $401,113.34. This amount does not include cost of additional telephones, nor cost of miles of wiring to afford operation.

The amount realized by the plaintiff as salvage for said switchboard and equipment, less the cost of removing same, was $206,315.79. For depreciation upon such of said switchboard and equipment as was in use by the War Department during the period of Federal control, August 1, 1918, to July 31, 1919, the Government paid plaintiff the sum of $22,232.78, and as 8 per cent return on the investment in said switchboard and equipment for that period, $25,671.00, a total of $47,903.78. For the entire period that said switchboard and equipment, or a part thereof, were in use by the War Department, the War Department paid plaintiff for the use of switchboard and multiple jacks connected therewith the sum of $11,202.20.

After deducting from the said cost the aforesaid items of salvage, depreciation, 8 per cent return, and rental, which aggregate $265,421.77, the net loss amounts to $135,691.57.

The court decided that plaintiff was not entitled to recover.

GRAHAM, *Judge*, delivered the opinion of the court:

The facts of this case are fully set out in the findings and it is not necessary to recite them. Nor is it necessary to discuss the question of the plaintiff's right to recover under the telephone service contract hereafter mentioned, as the suit is not based upon that contract, and, if it were, it is too clear for discussion that there is no provision therein under which a recovery for the claim set up in this suit could be allowed.

The plaintiff is suing, as stated in its petition and brief, to recover under the act of Congress of March 2, 1919, 40 Stat. 1272, known as the Dent Act, for the difference between the cost of installation of a switchboard for use of the War Department and the value of what it realized from the parts when the switchboard was removed. The reference to the act in the petition as the statute relied upon is in compliance with a rule of this court.

The switchboard was installed during the first half of 1918 and was completed on June 22, 1918. The claim here sued upon was presented to the Secretary of War, who referred it to the Board of Contract Adjustment, which rejected it, and on appeal to the Secretary of War the decision of the board was affirmed. Thereupon suit was brought in this court.

By section 4 of the act of June 17, 1910, 36 Stat. 468, 531, the Secretary of the Treasury was given sole authority to make contracts for supplies for the various departments of the Government, including telephone service. In the exercise of that power, on June 23, 1916, he entered into a contract with the plaintiff to provide telephone service for the various departments of the Government in the District of Columbia for the fiscal year ending June 30, 1917; and on May 18, 1917, a similar contract was entered into for the year ending June 30, 1918. During the period from August 1, 1918, to July 31, 1919, the Postmaster General was in control, under authority from the President, of telephone service. Under each of these contracts the plaintiff undertook to install and maintain such telephone equipment, at its own risk and expense, as would be required by the various departments of the Government in the District of Columbia, and to furnish service in connection therewith.

The original switchboard installed by plaintiff in June, 1908, was a three-position multiple private branch exchange No. 4 switchboard; on March 23, 1917, this was increased to five positions; in August, 1917, there was an increase to nine positions; on October 1, 1917, to twelve positions; and in November, 1917, came the first suggestion with regard to the switchboard out of which this controversy arose. These several increases were made by the plaintiff without claim upon the department for furnishing the facilities necessary to meet the increased business.

It is equally clear from the facts found that the Secretary of War made no agreement with the plaintiff to pay for the switchboard, never authorized such payment, never heard it suggested, and did not know that the plaintiff contemplated submitting a claim for the same until after the armistice. Mr. Scofield, who, if anyone under the Secretary of War, had authority to make such a contract, never stated to plaintiff's representative that the War Department would pay for the installation of or losses on the new switchboard, and the department never recognized the claim of an agreement with the plaintiff to pay for the switchboard other than by way of the usual rental provided for in the general supply contract.

It is necessary for recovery under the Dent Act that a party making a contract should have authority so to do, and in this case there is a complete absence of proof of authority. The purpose of the Dent Act was to give a remedy upon contracts irregularly made, not upon contracts without authority. *Jacob Reed's Sons* v. *United States*, 273 U. S. 200, 202; *Baltimore & Ohio Railroad Co.* v. *United States*, 261 U. S. 592, 596.

The findings show no express contract and no facts from which a contract could be implied. The contract required by the Dent Act must be a contract in fact or an agreement implied in fact, as distinguished from an agreement implied in law. *Baltimore & Ohio R. R. Co. case, supra.*

The petition should be dismissed, and it is so ordered.

SINNOTT, *Judge*, and GREEN, *Judge*, concur.

Chief Justice BOOTH dissenting:

This is a suit to recover the cost, less salvage value, of a central-office type of switchboard installed under contract to pay therefor, by the plaintiff in a building of the War Department. The cause of action arises under the Dent Act (40 Stat. 1272). The alleged contract is informal and one growing out of the acts of the parties. As far back at least as 1908 the plaintiff has been furnishing telephone service to the departments of the Government and the District government. The character of service furnished the War Department was and is what is technically termed "a private branch-exchange switchboard service." This service imposes the necessity of the telephone company installing a private branch-exchange switchboard in quarters furnished by the department, through the mediumship of which calls to the various rooms and branches are immediately available without the necessity of going through the main central-office switchboard. Concededly such a service conserves time and affords convenience. In 1908 the plaintiff installed in the War Department the usual, customary, and well-known #4 private branch-exchange switchboard. The board had a capacity of 280 lines, and when put in service 180 of the 280 were utilized.

In the annual legislative, executive, and judicial appropriation bill, approved June 17, 1910 (36 Stat. 468–531), the Congress provided for a general supply committee and centered the authority in the Secretary of the Treasury to contract for the furnishing of supplies for all the executive departments. Telephone service was expressly included in the act. Following the enactment of this legislation the plaintiff, so far as material here, entered into written contracts with the Secretary of the Treasury for the furnishing of telephone service to all the executive departments of the Government and the District government. These annual contracts were dated, respectively, June 23, 1916, May 18, 1917, and September 25, 1918, all known as general supply contracts. The determinative provisions and terms thereof appear in Findings III and IV. It is to be first noted that under the rates fixed by the Public Utilities Commission the plaintiff could do no more than contract to furnish the service at the established and approved rates of the commission.

The commission did recognize the possibility of the company being required to furnish a type of equipment at an extra cost of installation, and to meet such emergencies authorized the company to contract for and charge the expense incident thereto. The provisions with respect thereto are set forth at the close of Finding V. There was also in each contract an express provision that the company would furnish additional service and equipment at the rates stated in the same.

The plaintiff observed every obligation imposed under the general supply contracts; it performed its covenants under adverse conditions, and in the midst of increases in the service that taxed its physical resources and finally developed a situation which, I believe, rendered it impossible to proceed under the supply contracts, and the War Department was as fully aware of existing conditions as the plaintiff. The happening of events following closely upon each other, beginning with the Government's Mexican-border troubles, the unrestricted submarine warfare of Germany, and culminating with our entrance into the prosecution of the World War, so signally expanded the necessities of the War Department for telephone service that after exhausting every possible effort to meet the situation the plaintiff was in the end forced to do the special, unusual, and decidedly expensive thing of installing a central-office type of switchboard to meet the emergency and furnish the indispensable service. The telephone requirements of the War Department grew with rapid extension from a required service of 257 telephones in January, 1917, to more than 6,000 in 1918, and it was manifest to all concerned that an increase of from 8,000 to 10,000 was to be anticipated. The activities of the War Department itself expanded during this period to the occupancy of sixty-five different buildings in the District of Columbia alone, not including other outside activities with which the department was in almost constant communication. The plaintiff, to meet this unusual demand for service, provided thousands of miles of additional wiring, supplied innumerable telephones, and incurred the unusual expense of furnishing a special type of switchboard known as #604, all without additional expense to the department, the plain-

tiff accepting without complaint up to this point the munificent compensation of $24 per annum for the use of its switchboard.

The situation having thus become acute, both parties realizing that the limit of service under existing conditions had been attained, and the War Department being no longer able to furnish quarters for the installation of additional or the enlargement of existing switchboards, the department decided upon the erection of a separate building to accommodate the installation of a switchboard and afford the plaintiff sufficient space to install the same, together with necessary incidental equipment to furnish the required telephone service. In a conference with the authorized officials of the department, one of the conferees being a specially appointed and deputized officer in charge of supervision over the telephone service, the plaintiff presented its plans for the installation in the new building of a central-office type of switchboard. The plaintiff furnished to the Secretary of War, and by him transmitted to the proper officials, a complete set of blueprints and specifications for the erection of the new building, disclosing in detail the necessities for space and indicating clearly the type of switchboard it was going to install. This is not all; the plaintiff's superintendent told the chief clerk of the department precisely what was to be done, and that the company was to be paid the cost thereof. The record sustains this fact, not alone from the testimony of the superintendent but corroborated by the chief clerk himself. True, the chief clerk made no reply to the superintendent, but nowhere in the record does the chief clerk assert a disavowal of responsibility for payment or a lack of knowledge with respect to the fact that plaintiff was proceeding with the expectation of being reimbursed for this unusual expense, and this fact is found in the closing paragraph of Finding XIII.

Following the preliminary negotiations the War Department did erect, at a cost of at least $130,000, a new and separate building at 1723 F Street NW. This building, completed in record time, was so designed as to accommodate a central-office type of switchboard and all the necessary equipment. Within the building the plaintiff most expedi-

tiously installed a central-office type of switchboard at an admitted cost of $401,113.34, a telephone exchange sufficient in capacity to furnish telephone service to a city of 100,000 inhabitants, a switchboard that required almost double the number of operators to operate, and a board for which the plaintiff had absolutely no use except for this especial purpose. It possessed no value other than salvage to the plaintiff. After the war was over and the necessities of the department declined to normal and the property of the plaintiff had been returned to it, subsequent to the period of Federal control, the plaintiff sold this switchboard for a net sum of $206,315.79. For the rental of the switchboard and equipment during the period of Federal control, the plaintiff received from the Government $11,202.20, and there was paid the plaintiff a depreciation allowance upon the switchboard and equipment by the Government of $22,232.78; deducting the sum of these items from the cost of the board leaves the balance of $161,362.57, for which amount judgment is asked.

The Dent Act (40 Stat. 1272) was a congressional recognition of contracts which had "not been executed in the manner prescribed by law." In according vitality to informal agreements the Congress intended to and did expressly extend the remedy to agreements expressed or implied. The decision of the Supreme Court in the *Baltimore & Ohio Railroad case*, 261 U. S. 592, 596, in construing the statute held that a contract, express or implied, must not only be established but the authority to make the contract upon the part of the Government must likewise be proven. The plaintiff's case is dependent upon these two distinct issues. If we abstract from this record the written contracts, i. e., the general supply contracts, it is seemingly apparent that an implied contract to pay the amount claimed exists. Due to the situation confronting the parties at the time, the department resolved to erect a separate building and the plaintiff was compelled to supply an unusual and expensive switchboard of a special type. This would of itself, in the absence of other facts, warrant an inference that the plaintiff was furnishing equipment under circumstances of expecting pay therefor, and the department accepted the same under the

same impression, for it would be indeed unusual for a person or corporation, after having exhausted all its physical resources to perform a given service and expended a large sum for work, labor, and materials to that end, to voluntarily enter upon a distinct character of service involving a great expense without the thought of reimbursement, especially so when the prevailing condition is one of war emergency, and the source of remuneration for the additional outlay is subject to indefinite and permanent extinction. The defendant puts forth no argument in opposition to this contention of the plaintiff.

Among the various defenses interposed, two relied upon with much confidence are predicated upon an assertion that under the record the plaintiff was obligated to furnish the service under the supply contracts, and if not so it does not appear that any officer of the Government having authority to make contracts did make the contract relied upon. The scope of contractual obligations may be ascertained from what the contract itself indicates as the intention of the parties in making the agreement. In other words, taking into consideration the subject matter of the contract, and the terms used therein, what did the parties contemplate as to the beginning of the service and the limits to which one or the other may go in exacting performance of the same? As much better expressed in the case of *Canal Co.* v. *Hill*, 15 Wall. 94, 99: "* * * we should look carefully to the substance of the original agreement * * * as contradistinguished from its mere form, in order that we may give it a fair and just construction, and ascertain the substantial intent of the parties, which is the fundamental rule in the construction of all agreements." The general supply contracts covered a telephone service for *all* the executive departments of the Government and the District government. They were the formal, usual, and customary contracts executed under the general supply statute securing to the Government the customary telephone service. In each there was a provision anticipatory in character, i. e., a covenant which obligated the plaintiff to meet *normal* increases and a corresponding covenant to decrease the service and re-

duce the compensation to be paid if future conditions so warranted.

There is no provision in the contracts even remotely suggesting that the contracts were designed to cover the development of a condition due to a war, or that the parties thereto contemplated the extraordinary and pronounced expansion of the service which subsequently occurred. Surely a contention that the supply contracts exacted the furnishing of a switchboard of the size and cost furnished the War Department to each and all the executive departments mentioned in the supply contracts would be untenable. It is obvious that such a burden was never intended by the parties to be assumed without remuneration. The very insignificance of the compensation to be paid for a private branch-exchange switchboard, to wit, $24 per annum, clearly indicates what the parties contemplated. It is true one of the supply contracts was executed when war was flagrant and the service on the increase, but it is equally true that the plaintiff performed without extra expense, except as the contract provided, what it agreed to do under these contracts until conditions rendered the impossibility of further performance. While the character of the service remained the same, and the subject matter of the contracts did not change, it has been held by the courts that performance of additional service not within the contemplation of the parties when the contract was made, a service so vast in extent and so manifestly disproportionate as to characterize it as one distinct from the contract, may not be imposed upon a contractor without paying therefor. *United States* v. *Stage Co.*, 199 U. S. 414; *O'Brien* v. *Miller*, 168 U. S. 287.

The determinative issue with respect to a contract to reimburse is seemingly confined more to the question of authority to make rather than the existence of an implied contract. Every responsible and authorized officer of the department was advised and fully cognizant of the emergency situation and the absolute inadequacy of the installed equipment to meet the situation. Cooperation between the plaintiff and the officers existed. The vast extent of the changes necessary was assented to. Those in authority authorized the new building and can not escape express notice of the exact char-

acter of the switchboard to be erected therein. Mr. Scovell, in charge of the entire telephone service for the department under an appointment the legality of which is not questioned, concedes a contract to pay the cost of the board. The chief clerk, whose authority to contract is conceded, admits that the superintendent of the company said to him as follows:

"Do you remember anything being said to you by any officials of the telephone company about payment for the new switchboard? Do you have any specific recollection of anything being said to you?" to which he replied:

"I have a recollection that Mr. Claggett spoke to me, as I say, after the building was completed, or when it was substantially completed. He did not put it in the form of a letter, just mentioned it. He said: 'You know, we will have to ask you to pay for this,' or something like that—'we will have to bill you for this,' or some remark of that kind, but nothing in the nature of a formal demand."

and further:

"What did you say in response?" "I do not remember that I said anything. I do not know what I said."

It is true the chief clerk further testified that he did not indicate to the superintendent that he intended to pay the bill, but what is of more significance he did not indicate to him that he did *not* intend to pay the bill. Silence, when one is obligated to speak, not infrequently carries with it a greater degree of responsibility than spoken words. Two pertinent inferences are deducible from this testimony. First, the chief clerk knew the plaintiff was not doing this extra work for nothing. Second, no protest was lodged against the claim and no indication of a lack of assent to it. It is no criticism of the chief clerk and no challenge of his good faith throughout the transaction to emphasize the fact that under the law, where one in authority stands by with knowledge of a claim for pay for services and permits the performance of said services without a protest, he may not claim all the benefits thereof and disavow the responsibility to pay. This, I think, is axiomatic, and applies with added force when one party is indispensably in need of the service and the other party is insisting that no express contract exists exacting it. It has been long since adjudicated that a Government

contract is subject to the same rules of construction as a contract between private individuals.

Keeping in mind that the case involves an *implied* and *not* an express contract, it is difficult to escape a conclusion that the plaintiff did all it was required to do under the circumstances to establish its right to reimbursement. The Dent Act, it seems to me, was intended to afford relief in this identical class of cases. *Swift & Co.* v. *United States*, 270 U. S. 124. The acute situation as to telephone service in the department is reflected in the appointment of Mr. Scovell and placing in his charge the telephone service. Scovell during his incumbency had purchased telephone supplies "without any written order," and the department paid them without question. He had also given orders for work and installations extra in character to the plaintiff company; that is, oral orders, and payment had been made without question. It is conceded that Scovell was there to get the best and most expeditious service possible and that the "Secretary of War supported him in that." Nowhere in the record is it disputed that Scovell had direct charge of the telephone service and that the plaintiff dealt directly with him as occasion demanded. Scovell, an expert in his line, knew more about and came more directly in contact with the service than any or all the officers concerned. He and he alone was the actual participant put forward by the department to deal with the plaintiff. He reported directly to the Secretary of War, and so far as this record discloses this transaction is the single one where Scovell's authority to act has been questioned. The findings recite (Finding XII) that he had no contractual authority and then proceed to recite that he did without written orders from the Secretary of War or the chief clerk order this plaintiff to do extra work and make extra installations, for all of which the department authorized payments to be made.

It is not always difficult to spell out of a situation after the fact that no proclamation of express authority was ever issued to a certain official to act, when as a matter of fact during the confusion and pressure of an illimitable emergency, an emergency so great that the Secretary of War was under the tremendous burden of expending, as he says, "a

million of dollars every hour of the day and night, and every day in the week, including Sunday," no one questioned the authority of the official, and what he did in the discharge of his duties was approved without question. *Swift case, supra.* Scovell had some definite place in the organization, and if he was charged with the duty of procuring the best telephone service "as quickly as possible," surely it is no violent presumption that along with his assignment went complete authority to accomplish what he was charged with doing.

The authority of the chief clerk to contract is conceded, as previously observed; no one challenges his right so to do, and while the findings are replete with positive statements of lack of authority upon the part of Scovell, it is one thing to find as an ultimate fact lack of authority, and quite another to deduce from words and conduct the relationship obtaining between the parties to a transaction. It is difficult to conceive a right to hold one out to the public with authority to act, ratify a number of acts involving authority to thus act, and then after a transaction has passed to the point of execution and all the benefits of the same have been accepted and enjoyed, disavow responsibility to pay therefor. In the amendments made to the original findings nothing in the view of this opinion materially affects the status of the case. The amendment to Finding XII serves only to emphasize what was previously found, and the amendment to Finding XIII clearly indicates that the representatives of the telephone company expected pay, and at least one of its officials was unwilling, until ordered by his superior officer, to proceed without an express contract to pay. Surrounding the whole case, conceding *arguendo* that the findings are in all respects accurate, there exists, it seems to me, a clear, irrefutable inference and understanding that what the plaintiff was called upon to do was most extraordinary, unusual, and not within the customary and established course of dealing between the parties during all previous years. The defendant was fully aware of this fact, and it is difficult to conclude that under all the circumstances of the case the defendant expected to receive the service rendered without paying therefor.

Finding XVI, if relied upon as a defense, is, it seems to me, available to sustain the plaintiff's contention. The item of cost paid for removal of the exchange from the War Department to the new and separate building was paid under a conceded liability for equipment *not* provided for in the supply contracts. It is the switchboard *not* provided for in the supply contracts that is involved in this case, and it is the cost of same for which recovery is claimed, under an implied contract to reimburse. As a matter of fact, the payment of cost of removal of lines, wires, and various incidental materials, including labor involved, seems to be remotely connected with an alleged contract to pay for the switchboard involved. Cost of removal and furnishing a central-office type of switchboard are two distinct items.

A defense made in defendant's brief, insisted upon in the argument and covered by Findings XXI, XXII, and XXIII, is predicated upon an alleged reimbursement of the plaintiff by the American Telephone & Telegraph Company of the loss sustained by the plaintiff in installing the switchboard in suit. The opinion of the court contains no comment respecting the insistence. It is difficult to perceive what place the facts have in the record. This is not a suit for damages. It is for the recovery of compensation under an implied contract for materials furnished, and in the absence of any discussion of the issue, in the opinion of the court, the defense was obviously regarded as untenable.

Strange as it may seem, the defendant requested Findings XXIV and XXV. In these findings facts are recited disclosing a vast increase in revenue to the plaintiff company, while in the preceding findings the fact is found that notwithstanding these vast increases the plaintiff company in its anxiety to serve the Government during the war actually lost in furnishing extra equipment, etc., at least $1,250,000. The pertinency of these findings, as well as those with reference to the matter of Federal control, is to me obscure. It would be a most remarkable state of facts if at the end of the services rendered in this case the revenue therefrom should have remained at the same total sums as in the beginning. What all this has to do with the cost of installing a central-office type of switchboard can assuredly have no greater signifi-

cance than the basis for an inference that the plaintiff was alone concerned in installing this extra type switchboard for the increased profits which would accrue. Such an inference fails in view of Finding XXI.

This case being now before the court on the plaintiff's motion to amend the findings and for a new trial, I dissent from the judgment of the court in overruling the motion. I think the motion should be allowed, and that the findings should be amended in certain particulars as pointed out by the plaintiff and sustained by the record. The motion for a new trial should be allowed, and judgment awarded the plaintiff for the amount claimed in the petition.

Moss, *Judge*, concurring.

ORDNANCE ENGINEERING CORPORATION v. THE UNITED STATES

[No. 34680. Decided June 10, 1929]

On the Proofs

Patents; validity; infringement.—

(1) Claims 1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 15, 16, and 17 of the Bergman patent on illuminating-projectile, Letters Patent No. 1305186, granted May 27, 1919, *held* valid, and infringed by the United States.

(2) Claim 8 of the Bergman patent on illuminating projectile, Letters Patent No. 1305188, granted May 27, 1919, *held* valid, and infringed by the United States. Claim 1 thereof *held* not infringed. Claim 3 thereof *held* invalid.

(3) The Bergman patents on illuminating shell, Letters Patent No. 1305187, granted May 27, 1919, and on illuminating-body, Letters Patent No. 1381445, granted June 14, 1921, *held* to have been used under an implied license and not infringed by the United States.

Same; old elements; nonanalogous use.—Where a device employs elements old in the art, but its use is not the double or imitation of, or analogous to that of a prior patent which those skilled in the art would readily perceive, it is not anticipated by the prior patent.

Same; failure to perfect device by those skilled in the art.—Where a device is so perfected that it can be used in a way skilled mechanics have for years unsuccessfully endeavored to arrive

at, it is evidence that the application was not readily perceivable to those skilled in the art.

Same; license; use by employer.—Where one is employed by another for development and experimental work the result of the relationship is an implied license to the employer to use whatever invention develops from the experiment.

Same; act of October 6, 1917; secrecy order; tender of use.—The right under the act of October 6, 1917, to sue the United States for compensation for the use of an invention whose secrecy is enjoined is dependent upon an express tender of such use, disclosing sufficient to put the United States upon notice that to use the invention involves liability to pay compensation.

Contract; termination clause; settlement; perfected organization.—Where in termination of a contract according to its terms the United States takes over an organization that the contractor has brought to the point of perfection, a just and fair settlement therefor includes more than mere remuneration for actual expenses incurred in perfecting the organization.

Same; proof as to bad faith.—Proof as to bad faith in cancellation of a contract must be extremely clear and free from irreconcilable conflicts.

The Reporter's statement of the case:

Messrs. William B. King and *Eugene V. Myers* for the plaintiff. *Messrs. Franklin G. Manley* and *Marvin Farrington*, and *King & King* were on the briefs.

Mr. Charles F. Kincheloe, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. Daniel L. Morris* was on the brief.

The court made special findings of fact, as follows:

I. Plaintiff, Ordnance Engineering Corporation, is now and was during all of the time hereinafter mentioned a corporation duly organized and existing under the laws of the State of New Jersey.

II. In the summer of 1916 plaintiff communicated with and interested the United States War Department in its experimental work on illuminating shells, which resulted in plaintiff conducting a demonstration of its design of 2.18″ star shell for smooth-bore gun. This demonstration took place in January, 1917, at Sandy Hook, under the direction of the War Department. The official report of the War Department was very complimentary to plaintiff, a copy of

which was sent to the Chief of Bureau of Ordnance and later to the British War Office.

Early in 1917 the Ordnance Bureau of the War Department awarded plaintiff a contract for the manufacture of star shells for a 2.75″ trench mortar, a smooth-bore gun, and in the fall of 1917 two other types of star shells were developed by the plaintiff for the Ordnance Bureau of the War Department, one a 2.5″ and the other a 2″. All of these shells, i. e., the 2.18″, 2.75″, 2.5″, and 2″ were developed for the trench warfare section of the Army.

Plaintiff communicated with the Chief of the Bureau of Ordnance, United States Navy, under date of February 5, 1917, tendering its facilities for any of the Navy's requirements pertaining to ordnance and requested an interview regarding the star shells which it claimed to be developing and perfecting for the Army. The Navy bureau was very much interested in the development of a satisfactory shell for long-range work and emphasized the difficulties that would be encountered in developing the shell the bureau desired, which it declared must be capable of true flight through a long range and of ignition by a variable time fuze at the end of such flight. The Navy bureau forwarded plaintiff a drawing showing general arrangement and details of construction of 3″ shrapnel, stating that it had conducted experiments for some years endeavoring to perfect a satisfactory long-range star shell but without much success because the construction was not sufficiently rigid to withstand the shock of " set back " on gun firing and the time fuze did not eject and ignite the illuminating element without destroying the efficiency of its parachute elements.

On February 14, 1917, plaintiff wrote to the Navy Department, Bureau of Ordnance, inclosing copy of a memorandum on illuminating shells, plaintiff's Exhibit 46, by reference made a part of this finding.

Following this correspondence an interview between the officer in charge of the bureau's experimental work and plaintiff's officers took place in Washington February 17, 1917, at which time plaintiff left with the representatives of the bureau two drawings presented to the Navy Department. Both drawings detailed plaintiff's first design of 3″

star shells for firing from rifled cannon, dated February 14 and 15, 1917, plaintiff's Exhibits 14 and 15, by reference made a part of this finding. Like drawings were also sent to the War Department, Bureau of Ordnance, and to the British War Office.

At that conference the bureau officer was informed that plaintiff would proceed to manufacture some small illuminating shells for unrifled cannon, contract for which was then being negotiated with the Army, which when completed would aid in developing a high-velocity shell of the kind the bureau desired.

III. The Navy Bureau of Ordnance could not use the trench mortar or the shell fired therefrom as designed by plaintiff for the War Department. The Navy bureau was seeking the development and perfection of illuminating projectiles for use in Navy high-velocity guns, but in all experimental work to accomplish this end it desired to utilize Navy standard shrapnel shells for the body of any illuminating projectiles designed for its use, and so informed plaintiff.

IV. The negotiations between plaintiff and the Navy Bureau of Ordnance resulted in the making of a written contract under date of June 11, 1917, known as contract No. 1099. A copy of this contract is in evidence, defendant's Exhibit 46, and is made a part hereof by reference. By the terms of this contract plaintiff for a consideration of $5,000.00 undertook to produce ten 3″ illuminating shells of its own design, the bureau to furnish shell bodies, which were to be standard 3″ shrapnel nose pieces and fuses; these were experimental projectiles, the development of which was desired by the bureau for the purpose of producing a standard type suitable for adoption and for manufacture in quantity for issue to the naval service. The bodies furnished by the bureau could not be modified so as to eject the shell contents backwards because of walls tapering backwards, and plaintiff thereupon experimented to make a new design of star shell so as to provide for the ejection of the shell contents forward through the nose, as shrapnel is shot from the Navy standard shrapnel shell. The first shells made by plaintiff under contract No. 1099 were of the nose-ejection

type, with multiple lights. Subsequently, numerous experiments were conducted and several types of shells were made for ejection through the nose, which types were submitted to the bureau for test at Indian Head.

Later plaintiff became convinced that the nose-ejection type requiring multiple lights was of little practical value and resumed the development of its original design of base-ejection shell, utilizing the standard Navy shrapnel body, overcoming the difficulty of the tapering inner walls by introducing an interlining making them parallel. Several of these types were tested at Indian Head.

Inspection of shells made under contract No. 1099, was made by governmental inspectors under civil service; however, the same degree of inspection was not required as is usually required under a cost-plus contract.

V. In November, 1917, the Navy Bureau of Ordnance received from the British Admiralty drawings and specifications of the British 4″ star shell. These shells were not made in sizes to fit the American naval guns and the officer in charge of the experimental work for the bureau invited proposals from plaintiff for the construction of 40,000 4″ illuminating projectiles to be based on the design shown by the British drawings and specifications, and indicated the probability of another call by the bureau for a further proposal from plaintiff for the manufacture of 60,000 3″ projectiles of the same design; but in January, 1918, the bureau was advised that the British star shells did not function as satisfactorily as at first reported and made a request to plaintiff for quotations of cost and time for a small order of 50 projectiles for experimental purposes in addition to quotations on the large order.

VI. Plaintiff and the bureau made a second contract, the same being No. 35072, for the manufacture and development by plaintiff of twenty-five each of 3″, 4″, and 5″ illuminating projectiles for a total consideration of $15,000.00, the same to be based on the British drawings and specifications theretofore furnished plaintiff and modified by it to apply the design to the type of shell body which was to be furnished by the bureau. This contract was signed Febru-

ary 15, 1918, and later modified so as to provide for the manufacture and development of twenty each of the several sizes based on the British design with necessary modifications, and for the remaining five each of the several sizes to be constructed and developed by plaintiff after its own design.

A copy of contract No. 35072 was introduced in evidence as defendant's Exhibit 47 and is made a part hereof by reference.

Thereafter plaintiff made other modifications in the British design and drawings which were approved by the bureau.

VII. Tests of the twenty star shells made pursuant to the British design, after modifications by plaintiff with approval by the bureau, were made from time to time without resulting in the obtaining of a design satisfactory to the bureau, due to the fact that the parachute and ignition elements failed.

Subsequently plaintiff perfected its own illuminating composition or star and used this and its own multiple parachute making five of each size of shell as provided in the modification of contract No. 35072. These were tested by the bureau and the results in the case of the 3″ and 4″ shell were satisfactory. Plaintiff promptly prepared drawings of these and submitted them to the bureau, which were approved by the bureau.

VIII. Early in June, 1918, plaintiff submitted a proposal to manufacture 20,000 each of 3″ and 4″ star shells, based on the design prepared by plaintiff, which proposal was accepted with slight modifications by telegram dated June 17, 1918. A conference was requested by the bureau as a result of which the details of a contract were agreed upon, and the Bureau of Supplies and Accounts was requested to prepare a formal written contract.

This contract was let on a cost-plus percentage basis and provided for the erection of a suitable plant upon a site at Baldwin, Nassau County, Long Island, in the vicinity of plaintiff's aeroplane plant and machine shop, which site was to be provided by the Government. Because of the highly hygroscopic character of the materials and the nature of the work, a special unit plant was preferred in order to

permit plaintiff to completely manufacture there the interior metal parts designed and to assemble them in the exterior metal parts to be furnished by the bureau, together with the parachutes, which were intended to be subcontracted. The contract provided for plaintiff to be paid an engineering fee of $2,000 for services in connection with construction of the plant buildings.

The contract mentions that all experimental work carried on by the contractor for the benefit of the contract shall be construed as a cost item.

Copies of the proposal and of the contract No. 39716 are filed with plaintiff's petition, marked "Exhibits A and B," respectively, and are made a part hereof by reference.

IX. Star shells for high-powered guns had never been manufactured in this country with any degree of success, and plaintiff was necessarily obliged to create its own precedents and evolve its own formula of operation in connection with the carrying out of contracts with the Government. The performance of these contracts involved many new and untried features in production work.

X. At the time of entering into contract No. 39716 plaintiff had not overcome difficulties of construction in the 5″ shells which were desired by the bureau. Experimental shells of this size were covered by contract No. 35072 and also by two later contracts, one executed August 5, 1918, designated No. 40311, and the other September 10, 1918, designated No. 41065. Under contract No. 41065 the type of 5″ shell developed by plaintiff was very satisfactory. In principle this shell was identical with plaintiff's design of the 4″ shell developed and tested June 3, 1918, though its exterior form differed radically from the exterior of the 4″ design because of shape of standard Navy shell body. After a successful test in September, 1918, the bureau decided to proceed with the manufacture of these 5″ shells and under date of September 14, 1918, awarded contract to plaintiff. Drawings for this type of 5″ shell were made by the plaintiff September 14, 1918, and subsequently approved by the bureau and became a part of a contract between plaintiff and the bureau dated October 2, 1918, but not formally submitted to plaintiff and executed by the parties

until October 14, 1918, the same being contract No. 39716-A. This contract did not supersede the provisions of contract No. 39716, but contract No. 39716 was increased by contract No. 39716-A to include an additional size of shell.

A copy of contract No. 39716-A is filed with plaintiff's petition, marked "Exhibit G," and is made a part hereof by reference.

XI. When contract No. 39716 was entered into both parties believed that the development of a successful and satisfactory type for the 5″ star shell was imminent. At this time plaintiff urged that the proposed plant be of sufficient size to enable plaintiff to manufacture star shells of all three sizes, but the bureau declined to permit this.

XII. Plaintiff began to make preparations for the performance of contract No. 39716 before the same was executed by employing the Austin Company, then engaged in doing similar work for the Navy Department, to prepare plans for the building, which plans were later approved by the bureau.

XIII. On July 1, 1918, the bureau's representative orally stated that contract No. 39716 would be closed as of that date, and requested that plaintiff proceed as rapidly as possible. This request was later confirmed by telegram. This contract, dated July 1, was received by plaintiff on July 24 and, after making slight modifications pursuant to telephone conference with the bureau, was signed by plaintiff and returned to the Bureau of Supplies and Accounts on July 24. The contract was formally executed by the Paymaster General of the Navy on July 27, 1918. It was returned to plaintiff for attestation by witnesses on July 29, and such attestation was made and contract remailed the same day.

XIV. Plaintiff began to make preparations for the performance of contract No. 39716 before the written contract was actually signed by the Government representatives and a copy returned to plaintiff. Most of the material and equipment to be used in the performance of the contract required several months for its manufacture and delivery, and on July 3, 1918, plaintiff prepared and forwarded to the bureau orders for certain material and equipment im-

mediately needed for construction of parts of the shells it was to manufacture. Six days later the bureau advised plaintiff that orders for material and equipment had to be approved by the representative of the Bureau of Supplies and Accounts at New York City. On July 11 plaintiff submitted to the representative of the Bureau of Supplies and Accounts, for his approval, the order for the material and equipment, but said officer refused to receive or consider the order prior to the execution of the written contract. On July 22, 1918, the bureau authorized the representative of the Bureau of Supplies and Accounts to approve purchase orders. The following table shows dates at which plaintiff made out orders for material and the dates at which the bureau approved same:

	Plaintiff made out order	Bureau approved
Dehumidifying equipment (p. 626)	July 15	July 29.
Hydraulic equipment (p. 627)	July 3	Aug. 13 and 15.
Screw machines (p. 627)	Aug. 2	Aug. 15.
Presses (p. 627)	Aug. 6, 8	Aug. 20, 28.
Gordon dryer (p. 627)	July 15	July 31.
Silk (p. 628)	July 3	July 22.
Magnesium powder (p. 628)	July 3	July 31.
Linen line (p. 628)	July 15	July 31.
Barium nitrate (p. 628)	Aug. 15	Sept. 11.
Aluminum (p. 628)	July 26	Sept. 18.

XV. Plaintiff applied to the War Industries Board on July 3, 1918, reciting its contract and asking for information about priority certificates, and on July 19 the priorities division sent plaintiff a priority certificate in class A–3. This was of no advantage to plaintiff as present priorities exhausted the available facilities. Plaintiff had in its proposal of June 13 stated that it would require a priorities certificate class A–1.

Plaintiff on July 9, 1918, and repeatedly thereafter, made further applications for further priorities and requested action upon its application until its application for priorities was granted on August 5, 1918, on which date the site at Baldwin, Long Island, was commandeered.

Much friction developed between the assistant ordnance inspector and plaintiff's representatives.

The bureau frequently advised the ordnance inspector and his assistant that the work under this contract should be expedited in every way possible.

XVI. On or about October 4, 1918, the bureau urged the plaintiff to expedite the production of 1,000 3″ shells for shipment abroad. Plaintiff informed the bureau that in order to expedite the manufacture of 3″ star shells it would be necessary to change the design upon which contract No. 39716, for 3″ star shells, was based. The bureau objected to making any changes, but finally permitted plaintiff to make up five experimental shells embodying the proposed changes and submit them to test at Indian Head. Plaintiff immediately changed the design of the shell, and used a powder pellet of its own make, and tested them at Indian Head on October 11, at which time all the shells functioned satisfactorily.

Immediately after the test was made plaintiff prepared drawings of the modified design for 3″ star shells, which drawings were approved by the bureau. On January 6, 1919, patent was applied for on this new or modified design, which patent was issued on May 27, 1919, as No. 1305187. On October 28, 1918, plaintiff reported the progress that was being made on these 3″ shells and stated that it was ready to begin to load the shell bodies on arrival, and to load them continuously thereafter.

On November 2, Beckhorn, the assistant inspector, entered the following in his diary:

"I reported to Commander Cresap that parts for 1,000 3″ star shells are nearly complete and that loading can begin as soon as we receive the shells, nose, and base plug."

XVII. The tests found in Findings IV, VII, and XVI were made at the Government proving grounds, using Government guns, equipment, and personnel, for all of which the Government bore the expense. Plaintiff paid the transportation charges on the shells tested, and furnished at its own expense at Indian Head its experienced employees, officers, and engineers as experts to observe and record data which they disclosed to the Government.

Plaintiff also tested material, component parts, and shells at its own expense.

XVIII. On November 23, 1918, a representative of the Navy Department delivered to Franklin G. Manley, president of the Ordnance Engineering Corporation, an undated letter as follows:

NAVY DEPARTMENT,
Washington.

Subject: Cancellation of Supplies and Accounts Contract #39716.

GENTLEMEN: In view of the very unsatisfactory progress being made under your contract No. 39716 for star shells, and the cessation of the national emergency for which the contract was prepared, and in accordance with clause No. 18 of the contract the department hereby cancels this contract, to take effect when notice of cancellation is served upon you.

The Government will assume the outstanding obligations of the company properly entered into for the purpose of this contract and a fair settlement will be made, having in mind all the conditions and provisions in the contract. Details of the settlement will be arranged in conference with you and representative of the Bureau of Ordnance.

Lieut. S. C. Mastick, U. S. N. R. F., is hereby designated as a representative of the Navy Department, to whom you will deliver the plant and with whom you will arrange the details of the settlement.

Very respectfully,

FRANKLIN D. ROOSEVELT,
Acting Secretary of the Navy.

On the same date plaintiff corporation, by Franklin G. Manley, president, sent the following letter to the United States Navy Bureau of Ordnance:

NOVEMBER 23, 1918.

U. S. NAVY BUREAU OF ORDNANCE,
Washington, D. C.

(Via naval inspector of ordnance, 36 Cortland St., New York City.)

DEAR SIRS: We acknowledge the Navy Department's communication, reference No. 32244 (H3)–0, undated, signed by Mr. Franklin D. Roosevelt, Acting Secretary of the Navy, delivered to us by Lieut. S. C. Mastick, U. S. N. R. F., at 10.50 a. m., November 23, 1918.

We desire to record our protest against the cancellation of this contract upon the basis expressed in the opening state-

ment of the notice above mentioned, viz, "In view of the very unsatisfactory progress being made under your contract 39716 for star shells."

In this connection, we now call your attention to the following facts:

No shell bodies, nose pieces, or base plugs have as yet been delivered to us by the Navy Department.

2. Our work on the first lot of 1,000 3″ star shell on Nov. 21, 1918, was 61–81/100 per cent completed.

We shall be pleased to extend our hearty cooperation to the bureau and the bureau's representatives in adjusting the outstanding details of this matter and in any other way in which we can be of assistance.

Yours very truly,

ORDNANCE ENGINEERING CORPORATION,
By F. G. MANLEY, *President.*

Contemporaneously with proceedings to terminate the contract, the bureau then sought and obtained permission from the department to take upon the Government pay rolls such employees as might be determined upon by the Government inspector in charge.

XIX. At the time of the cancellation of the contract the buildings comprising the plant, as originally provided for, and certain additions thereto, were substantially completed. The heating system had been tested and fire was in the boiler. The foundations for the latest additions had been laid and a small portion of the walls was up. The machinery had been delivered and a small part of it had been installed and was ready for operation. Plaintiff was operating with sufficient electric power at its aeroplane plant for that portion of the work under contract No. 39716 to be temporarily carried on at that place until the plant was completed. The original source for electric power which plaintiff had considered would be available had failed. Plaintiff had tentative plans to obtain electric power at another source, but no specific arrangements for the same had been made.

The plant was connected to the village water supply, but it was apparent that this supply of water would be insufficient for the operation of the plant. Plaintiff had made

tentative arrangements with the water department of the city of New York to use water from the reservoir in the rear of the plant.

Plaintiff had on hand and in storage all materials needed for the manufacture of 3″ and 4″ star shells, and had ordered most of the material needed for manufacturing the 5″ shells, some of which had been received.

The first 100 of the 3″ star shells of the type developed and approved October 17, 1918, were 97% completed. The first 1,000 of such shells were 82% completed. Plaintiff had on hand a number of its own type of conical powder pellets and a mould for making same.

On November 12 plaintiff was ready to begin to assemble its material into the shell bodies, nose pieces, and base plugs to be furnished by the bureau, but which had not at that time been delivered. At the time of the cancellation of this contract plaintiff had not received from the bureau any shell bodies, nose pieces, or base plugs for use under either contract.

XX. The contracts in question were entered into during the war emergency period, but the Navy was in need of the shells for many years before the war and has needed them since the war.

XXI. The foregoing facts and the evidence in this case do not satisfactorily and clearly prove that the cancellation of contract 39716 was an act of bad faith on the part of the Navy Department.

XXII. On November 23, 1918, the Navy Department began to operate the plant as the "United States Naval Ordnance Plant, Baldwin, Long Island, N. Y.," and has since continued the operation of the same. The Navy Department took possession of all buildings, equipment, materials, records, papers, and drawings pertaining to the work covered by the contracts, including plaintiff's plans, inventions, developments, and its new type of powder pellet. The Navy also took over the entire organization of plaintiff with the exception of the executive officers and chief engineer. Within sixty days after the time that the Navy took over the plant shells were being produced and within ninety days the entire plant was in operation.

XXIII. Subsequent to the termination of the two star-shell contracts the Navy Department occupied a portion of plaintiff's general offices in New York City and continued to occupy said offices until the following February. It also occupied portions of plaintiff's aeroplane plant and facilities until June, 1919.

Within sixty days after the Navy officials took over the plaintiff's plant they completed and delivered about 100 of the 3″ star shells which had been partially completed by plaintiff. They used plaintiff's laboratory and aeroplane-plant facilities, the materials on hand, and the plaintiff's type of powder pellet.

In continuing said work at the plant the Navy also utilized the orders for material that had been given by the plaintiff.

XXIV. Before the cancellation of the contracts plaintiff had given orders or entered into subcontracts, all of which orders had been approved by the naval authorities, as follows:

(a) For buildings	$124, 141. 00
(b) For plant equipment	182, 924. 83
(c) For materials to be used in production of star shell, ordered, a part of which had been received	248, 935. 26
Total	556, 001. 09
(d) In addition, correspondence had been had relative to materials to be used in production of star shells, the value of which materials was	92, 035. 58
	648, 036. 67

There is no satisfactory evidence as to the amount, trouble, or cost of this correspondence.

XXV. Plaintiff estimates the total expenditures necessary for the completion of the contract to be $2,153,111.36 and the total anticipated profits to be $184,289.56, which latter figure is 8.56 per cent of said estimated total expenditures.

XXVI. Plaintiff has been paid the following sums by the United States for its services, expenses, and expenditures under the contracts in suit:

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Engineering fee, construction of buildings	$2,000.00
Factory overhead expense	9,145.11
General and administrative expense	19,745.56
Profit	4,949.55
Reimbursement for special plant structures	114,937.00
Reimbursement for materials	108,810.51
Reimbursement for labor	3,423.50
Total	263,011.23

Part of said payments to the plaintiff was for payment of salaries of plaintiff's general officers and engineers, paid by the United States at the following rates per annum:

Franklin G. Manley, president	$6,000.00
Sheldon Franklin, secretary and treasurer	3,000.00
Axel G. Bergman, chief engr	7,500.00
L. W. Burgess, 1st assist. engr	5,000.00
M. W. Lubash, chemical engr	3,000.00
David Lubash, assist. chemical engineer	2,500.00
George W. Barton, assistant	2,500.00

XXVII. Plaintiff was originally paid the percentage of profit fixed by paragraph 6 of the contract upon all the materials delivered at the plant for use in production of the star shells, but upon the issuance of voucher of April 26, 1919, a deduction was made over plaintiff's protest of $9,938.01, a profit already paid plaintiff upon materials delivered, upon the ground that profit should be allowed on materials entering into production instead of on materials as purchased.

XXVIII. During the life of the contract plaintiff's chief engineer, Axel G. Bergman, devoted his entire time to the contract and to the development of the star shells and received remuneration at the rate of $10,000 per annum, $7,500 of which was to be paid by the United States under the contract.

During the period from July 1, 1918, to November 23, 1918, the total sum paid Axel G. Bergman, for which plaintiff was not reimbursed by the Government, was $992.55.

XXIX. The shells manufactured by plaintiff under contract 39716 and those manufactured by the Navy Department after the termination of the contract were the result of development work carried on by the plaintiff through its chief engineer, Bergman, in which work the United States co-

operated and aided subsequent to the first experimental contract entered into June 11, 1917.

This aid and cooperation included payment to plaintiff for experimental and development work and testing of shells by the Navy Department.

There is no satisfactory evidence that the inventions contained in Bergman application 149260, filed February 17, 1917, embodied any suggestions of officers of the United States or that plaintiff received any special remuneration for the experimental or development work which resulted in these inventions.

XXX. In addition to the expenditures set forth in Finding XXVI, plaintiff expended the sum of $60,725.31 in its work of developing and perfecting its design of star shell. Plaintiff received from the Navy bureau and War Department on contracts other than those involved in this suit the sum of $40,953.62. Plaintiff's expenditures exceeded its receipts by $19,771.69.

The Chief of Bureau of Ordnance on March 22, 1920, offered plaintiff in settlement of its claim a 5% handling charge on the value of materials purchased but not used in production prior to November 23, 1918, amounting to $4,201.69, together with an additional lump sum of $10,000 to cover all other demands under or on account of said contracts and termination and subsequent completion by the Navy Department. This offer was refused by plaintiff on May 14, 1920.

XXXI. The sum of $35,000 is found to be just and fair settlement due to the termination of the contract by defendant.

XXXII. In May, 1916, plaintiff corporation, through its chief engineer, Axel G. Bergman, started experimentation upon illuminating projectiles, or star shells.

The first development related to shells for smooth-bore guns. The first drawing for a shell of this kind was made by plaintiff in May, 1916. In September, 1916, application for patent thereon was filed.

XXXIII. On February 17, 1917, Axel G. Bergman, chief engineer of plaintiff, filed an application, serial number

149260, in the U. S. Patent Office for "illuminating projectiles," which application subsequently materialized into patent 1305186 and divisional patent 1305188.

On January 9, 1918, and prior to the filing of the divisional application (filed April 2, 1919, which resulted in patent 1305188) plaintiff received the following notice from the Commissioner of Patents:

"DEPARTMENT OF THE INTERIOR,
UNITED STATES PATENT OFFICE,
Washington, January 9, 1918.

"AXEL G. BERGMAN,
Care Fraser, Turk & Myers,
No. 170 Broadway, N. Y.
"Serial Number 149260.
"Filed Feb. 17, 1917.
"For illuminating projectiles.
"By Axel G. Bergman.
"Assignee, Ordnance Engineering Corp. of N. Y.

"*Notice*

"To Axel G. Bergman, his assignees, Ordnance Engineering Corp. of N. Y., his heirs, and any and all his agents:

"Under the provisions of the act of October 6, 1917 (Public No. 80; 243 O. G., p. 797), you are hereby notified that your application as above identified has been found to contain subject matter which might be detrimental to the public safety or assist the enemy in the present war, and you are hereby ordered to in nowise publish the invention or disclosure of said application, but to keep the same secret during the period of the present war (unless by written permission first obtained of the Commissioner of Patents), under penalty of the invention being held abandoned. This application must be prosecuted under the rules of practice until a notice is received from the office that the case is in condition for allowance. Such notice closes the prosecution of the case, except under provisions similar to those set forth in rule 78. Furthermore, if previously allowed and now withdrawn the prosecution of the case is likewise closed. When the application is in condition for allowance it will be withheld from issue during the period of the war.

"Your attention is also called to the provisions of section 16, of trading with the enemy act of October 6, 1917 (Public, No. 91)."

And in February plaintiff received the following letter from the Federal Trade Commission:

FEDERAL TRADE COMMISSION,
Washington, February 20, 1918.

In re application for United States patent of Axel G. Bergman, S. N. 149260. Filed February 17, 1917, For illuminating projectiles.

GENTLEMEN: Inclosed is a duly certified copy of an order of the Federal Trade Commission with reference to the matter identified in the caption of this letter. Violation of this order entails a fine of not more than ten thousand dollars ($10,000) or imprisonment of not more than ten (10) years, or both. You are directed to govern yourselves accordingly.

Very truly yours,
FEDERAL TRADE COMMISSION,
L. L. BRACKEN, *Secretary.*

Thereafter upon the application of plaintiff, the Commissioner of Patents, on February 27, 1918, issued to said Bergman and plaintiff the following order:

"Whereas the applicant in the above-noted application was ordered under the provisions of Pub. No. 80, to in nowise publish or disclose the subject matter of said application during the period of the war without the consent of the Commissioner of Patents; and

"Whereas the applicant now petitions that he may be permitted to tender the invention and disclose the subject matter of said application to the Ordnance Engineering Company and to tender the invention to the Government of the United States, and to make such further disclosure to departments thereof as will enable them to continue manufacture and development of the devices mentioned in the above patent application, to the end that they may complete their contracts and enter into others with the various departments of the United States Government; said

"Order of the Commissioner is hereby rescinded to the extent of granting said petition, and the applicant is hereby authorized to make such tender and disclosure, under the provisions that all reasonable and due precautions be taken to otherwise safeguard the invention against publication and disclosure."

Subsequent to this order plaintiff did not discuss the subject matter of its patents with anyone outside of its organization, with the exception of its patent attorneys and representatives of the Bureau of Ordnance of the Army and Navy,

The secrecy order was rescinded December 20, 1918, and the said application was allowed April 29, 1919, and patented May 27, 1919, as patent 1305186.

XXXIV. Plaintiff's Exhibits 14 and 15 by reference made a part of Finding II and which were delivered to the Bureau of Ordnance of the Navy Department on February 17, 1917, contain upon them the legend "Patent applied for." On November 20, 1917, plaintiff in a letter to the Bureau of Ordnance, defendant's Exhibit 53, which is by reference made a part of this finding, stated in part:

"You will see from our original designs and drawings dated Feb. 15, 1917, that our first idea was to eject the lights through the rear of the shell. Copies of these drawings were sent to our vice president, Mr. Robert Gordon Blackie, in London, England, and were by him submitted to the different British authorities, and we are of the opinion that they may have led to the present British development. Our patent attorneys, Messrs. Fraser, Turk & Meyers, of this city, advise us that our applications cover this field, subject, of course, to patents already issued.

"We mention this in order that the department may be informed as to the facts, but without any idea of interposing our rights, if any, between the country and its needs."

No specific tender of the inventions embodied in application 149260 was made to the Government except as shown herein.

A tender of the general experience of the Ordnance Engineering Corporation was made in letters of February 5, 1917, and February 7, 1917, sheets 1–7, inclusive, of plaintiff's Exhibit 7, which are by reference made a part of this finding.

XXXV. Bergman patent 1305186 was filed with plaintiff's petition as Exhibit J and is made a part of this finding by reference. The invention embodied in this patent has reference to an illuminating projectile, the specifications stating that the invention enabled a shell to be produced for use in connection with higher powered guns than it had been hitherto possible to use effectively. The principal object of the invention is stated to be for the provision of an illuminating shell from which the illuminant can be discharged at any point in the trajectory, practically irrespective of the

speed of the projectile at the time of such discharge. Two principles are involved.

The first of these is the provision of a preliminary retarding or checking device which comes into action immediately after the illuminant is discharged from the projectile, the same functioning to overcome the speed of the illuminant, reducing its velocity until the sustaining means or parachute may safely function. In the disclosed embodiment the retarding or checking means as shown is a small parachute functioning prior to the large parachute and serving to retard the illuminant and reduce its speed to a point where the large parachute may safely function without tearing to pieces or slitting. In this construction there are two elements involved—i. e., the retarding element for taking the checking or retarding strain and the sustaining element for performing the sustaining function.

The second principle disclosed in connection with high-speed illuminating projectiles contemplates the discharge of the illuminant and its sustaining parachute from the rear or base end of the projectile and hence in a direction opposite to the line of flight. This assists in checking the forward speed of the illuminant and therefore reduces the duty imposed upon the checking device. Both of these principles are combined in the structure shown in Figs. 4 and 5 of the patent. The embodiment illustrated in these figures is primarily adapted for a smooth-bore gun, the projectile being provided with a tail device to prevent tumbling of the projectile. The parachute structure and illuminant is confined in the shell body and is released by virtue of a detachable base, which is blown off by a small charge of powder at the desired time of ejection.

The projectile is provided with a time fuse for igniting the expelling charge at a predetermined point in the trajectory. The expelling pressure is not exerted directly upon the illuminant and parachute unit, containers being provided for these parts. Shortly after the illuminant and parachute structure are ejected, the small retarding parachute begins to function until the speed is reduced sufficiently to bring into action the sustaining parachute. This is accomplished by appropriate mechanism which frees the large parachute

so that it may unfurl and come into action. A fuse train is provided for igniting the illuminant prior to the coming into action of the sustaining means, the fuse train being ignited by the expelling charge.

Plaintiff claims infringement of claims 1, 2, 3, 4, 6, 8, 9, 10, 11, 15, 16, 17, and 18 of this patent.

The file wrapper and contents, which matured into Bergman patent 1305186, defendant's Exhibit 55, is by reference made a part of this finding.

XXXVI. Bergman patent 1305188 was filed with plaintiff's amended petition as Exhibit L and is made a part of this finding by reference. This patent is a divisional one, being based upon matters shown originally in Bergman patent 1305186. This patent finds its basis in a requirement for an election of species in office action of March 27, 1919, in Bergman application, serial #149260, which was as follows:

"Upon reconsideration of this case it is found that election of species is necessary. The claims in group A are broad enough to cover all of the modifications shown and may therefore be retained in the case with but one set of claims found in group B or in group C, the claims in group B being specific to the modification shown in Figs. 1, 2, and 3, while those included under group C are specific Figs. 4 and 5.

"Group A: 1 to 6, inclusive, 14, 22, 23, and 24.

"Group B: 7 to 13, inclusive, and 25.

"Group C: 15 to 21, inclusive, and 26.

"As an illustration of how the claims in group B fail to read on Figs. 4 and 5, claim 7 may be taken as an example. It is clear that the 'inner casing' is designated as *m* in Fig. 4 and that 'illuminant' is not contained 'within said inner casing.'

"The claims appear allowable. * * *"

The claims of this patent are specific in character, relating to the structure disclosed in Figs. 1, 2, and 3 of the parent patent 1305186. The features of the invention contained in these claims relate to the protecting of the illuminant against the force of the expelling charge. For this purpose there is suggested a complete container for the illuminant, the walls of which take the shock of the expelling charge, the container afterwards falling away, so that the sustaining parachute has only the weight of the illuminant to carry and not that of

the container. Plaintiff claims infringement of claims 1, 3, and 8 of this patent.

The file wrapper and contents, which matured into Bergman patent 1305188, defendant's Exhibit 56, is by reference made a part of this finding.

XXXVII. Bergman patent 1305187 was filed with plaintiff's amended petition as Exhibit K and is made a part of this finding by reference. The application serial #269762 for this patent was filed on January 6, 1919, the patent being issued under date of May 27, 1919. The invention as disclosed embodies the same general principles of retarding and sustaining operations and base ejection as were set forth in Bergman patent 1305186. In addition, the disclosure of this patent relates to adaptation of the structure of the prior patent whereby the projectile may be shot from the high-powered rifled guns used in the Navy. The projectiles may also be substituted at will for the ordinary explosive or shrapnel shells for which these guns are designed, the projectile being so constructed that it can be fired under the same conditions and with similar firing charges and for the same distances as explosive shells of the same size. The patent discloses a structure which retains the illuminant in a fixed position within the projectile prior to its rear expulsion and means for causing the said expulsion at a predetermined point in its trajectory, including a time fuse and expelling charge. The expelling charge is located at the front of the projectile and a baffle plate is located at the front of the projectile against which the expelling charge exerts its pressure when the same functions. This baffle plate not only expels the illuminant and parachute structure out through the base of the projectile but in addition functions to force off the base.

The illuminant is provided with lightweight container with bracing walls and a supporting plate, which are in turn supported by bracing walls in contact with the base plate. By this structure the illuminant is protected from shock during the operation of the bursting or expelling charge and the expulsion of the illuminant and parachute unit through the rear of the projectile. The bracing walls are segmental

and separable from the illuminant body and after expulsion fall away, freeing the illuminant from excessive weight.

The retarding parachute and sustaining parachute are arranged in line or in tandem with each other and are attached to the illuminant by a ball-bearing swivel so that the illuminant is successfully ejected and sustained in its flight without regard to the excessive rotative movement of the illuminant due to the spinning of the shell, which is in turn due to the rifling of the gun from which the shell is discharged. The spinning of the illuminant may continue after expulsion without tangling the retarding and sustaining means by virtue of the ball-bearing swivel.

The expelling charge is located in the front of the projectile, and beneath it the illuminant; and below the latter the parachute unit is located, so that the parachute unit is ejected first, and the illuminant is ignited during the explosion of the expelling charge. At the same time the illuminant is protected from the expelling charge, i. e., by the provision of a very small aperture in the baffle plate, and an expansion or explosion chamber immediately under the plate in which the powder gases may expand without subjecting the illuminant to excessive pressure. The illuminant is protected during burning and while being sustained in the air by the sustaining unit by a reinforcing coil of copper or other soft material embedded in the illuminant. Means are also provided for preventing preignition of the illuminant due to friction between the baffle plate and its supporting walls. The specification states that the invention is not limited to the preferred form set forth.

The operation of the improved shell of the second patent is as follows: As the projectile is especially adapted for high-powered rifle ordnance, it is provided with the well-known rotating band. The projectile is also provided with the usual nose fuse which is set to operate the projectile at a predetermined point in its trajectory. When the fuse operates in mid-air, the expelling charge is fired and the force of this charge is exerted against the baffle plate which in turn transmits it to the separable bracing walls and a supporting plate which in turn presses against the base of the projectile, forcing the latter out of the projectile. Following this the baffle

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plate ejects the whole contents of the shell, including the illuminant and parachute unit and bracing walls, the latter falling away and leaving the lightweight unit and the parachute unit free. The parachute unit immediately partly unfolds, bringing into action one or more small checking parachutes which retard the flight of the illuminant. At the end of their operation the large or sustaining section of the parachute unit comes into play and holds up the illuminating body during its burning. The illuminating body has been ignited while still in the shell by the action of the explosion charge, the hot gases from which have passed through the small holes in the baffle plate, expanded to make them ineffective to burst the charge but effective to ignite it, so that the illuminant is already ignited and burning when it leaves the shell. It continues to burn without breaking up by reason of the soft metal reinforcing coil.

Plaintiff claims the infringement of claims 1 to 29, inclusive, of this patent.

The file wrapper and contents, which matured into Bergman patent 1305187, defendant's Exhibit 49, is by reference made a part of this finding.

XXXVIII. Bergman Patent 1381445 was filed with plaintiff's amended petition as Exhibit M and is made a part of this finding by reference. This patent relates to a powder pellet suitable for the purpose of igniting the illuminant or illuminating shell.

Axel G. Bergman began experimenting on powder pellets in June, 1918. On July 20, 1919, he filed application, serial #310464, for patent which materialized into the patent above referred to. This patent relates to the ignition of the highly compressed illuminant of a star shell. Such illuminants are difficult to ignite directly by the expelling charge of the shell, and the powder pellet is accordingly used, which ignites from the expelling charge and in turn by its burning ignites the illuminant body. The present patent provides for a powder pellet shaped similar to the frustum of a cone with a small end located at the exterior of the illuminant where it can be ignited by the gases of the expelling charge. This shape cooperates to maintain the powder pellet in position and in addition to project the flame more advantageously against

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the encompassing star mass so that the flame from the pellet is caused to impinge upon an overhanging portion of the star mass.

XXXIX. Prior to the time when Axel G. Bergman made the inventions of the patents in suit, there were in the art of illuminating projectiles for ordnance to which said patents relate the following patents:

United States patents

No.	Date	Name	Invention
41173	Jan. 5, 1864	Amici	Illuminating and signal shell.
1003082	Sept. 12, 1911	Ziegenfuss	Searchlight projectile.
1011002	Dec. 5, 1911	Wunche	Searchlight projectile.
1079821	Nov. 25, 1913	Ziegenfuss	Illuminating body for illuminating projectiles.
1090007	Mar. 10, 1914	Ziegenfuss	Luminous projectile.
1108654	Aug. 25, 1914	Ziegenfuss	Luminous projectile.

Foreign patents

Country	No.	Name	Invention
Great Britain	28468/1912	Krupp	Illuminating projectile.
Great Britain	7660/1913	Krupp	Illuminating body for illuminating projectiles.
Great Britain	19069/1913	Krupp	Illuminating projectile.

There have also been issued the following patents relating to the general art of outdoor illumination by the use of luminant bodies:

United States patents

No.	Date	Name	Invention
82619	Sept. 29, 1868	Harris	Pyrotechnic signals and rockets.
480012	Aug. 2, 1892	Hand & Teale	Signal rockets for vessels.
519159	May 1, 1894	Pain	Pyrotechnic device.
624530	May 9, 1899	Pain	Pyrotechnic signal.
907112	Dec. 22, 1908	Aasen	Rocket parachute.
1095869	May 5, 1914	Hyra & Klinkosch	Pyrotechnical illuminating device.
1178304	Apr. 4, 1916	Dutcher & Edson	Aerial signal.
1299217	Apr. 1, 1919	Pain	Rocket.

Foreign patents

Country	No.	Date	Name	Invention
Great Britain	10816/1915	Applied for July 26, 1915; accepted in Great Britain March 13, 1919.	Holt	Aerial illuminating device.
Great Britain	7363/1917	Applied for May 17, 1915; accepted in Great Britain Nov. 29, 1917.	Pain	Illuminating flare.

There is no satisfactory evidence when these British patents were available to the public within the meaning and intent of the patent statutes or when they were sealed.

There have also been issued the following patents relating to parachute devices for aeroplanes and flying machines:

United States patents

No.	Date	Name	Invention
1011683	Dec. 12, 1911	Webb	Safety alighting attachment for flying machines.
1187230	June 6, 1916	Riches	Parachute.

Foreign patents

Country	No.	Date	Name	Invention
France	465536	Delivered Feb. 9, 1914, published April 18, 1914.	Sloan	Aeroplane parachute.
France	[1] 465536	Delivered Sept. 23, 1914, published Jan. 20, 1915.	Sloan	Aeroplane parachute.
France	451289	Delivered Feb. 10, 1913, published April 15, 1913.	Drake	Safety device for aeroplanes.
France	474585	Delivered Dec. 12, 1914, published Feb. 25, 1915.	Lawrence	Safety device for aeroplanes.
Great Britain	105944	Applied for April 4, 1916, accepted May 4, 1917, and patent issued at a later date.	Calthrop	Improvements in parachutes for aeroplanes.

[1] 1st addition No. 19368.

There also have been issued the following patents relating to miscellaneous subjects:

United States patents

No.	Date	Name	Invention
52314	Jan. 30, 1866	Noyes	Explosive shell.
757825	Apr. 19, 1904	Maul	Rocket apparatus for taking photographs.
1207520	Dec. 5, 1916	Fabiani & Agnelli	Percussion shell or bomb to be dropped from aeroplanes.
1229170	June 5, 1917	Troje	Toy projectile.
1271029	July 2, 1918	Gathmann	Dummy practice bomb.

Foreign patents

Country	No.	Name	Invention
Great Britain	12772/1903	Maul	Apparatus for taking photographs from a great height.

The following patents have also been issued:

1309982, filed Dec. 9, 1918, issued July 15, 1919, Darling.

1310132, filed Feb. 6, 1919, issued July 15, 1919, Passet.

By reference to printed or photolithographic copies of the aforesaid patents, such patents are made a part of this finding.

XL. The following blue prints of British drawings were delivered to defendant's attorney by the British War Office in the year 1925:

4760	Dated Apr. 29, 1885
10359A(1)	" Sept. 18, 1900
14553	" Feb. 3, 1906
16898	" Aug. 5, 1910
2708	" May 23, 1913
233346	" Nov. 28, 1915
24085	" Apr. 4, 1916
24021	" Apr. 5, 1916
24486	" June 20, 1916
24674	" Aug. 25, 1916
24843	" Aug. 28, 1916
25031	" Mar. 23, 1917
26172	" July 17, 1917

These drawings were in the private files of the British War Office in London, England, and said drawings are and have been confidential and not available to the public.

XLI. There is no satisfactory evidence that the Navy Department drawing 2252, defendant's Exhibit 57, by reference made a part of this finding, and British drawing, defendant's Exhibit 47 (plaintiff's Exhibit 23–A), by reference made a part of this finding, were available to the public within the meaning and intent of the patent statutes prior to February 17, 1917.

XLII. According to the stipulation which has been entered into in this case, filed November 16, 1926, the Government manufactured a star shell similar to that shown in drawing 72294 from the time of the termination of the contracts or shortly thereafter in 1918 until May of 1922, when the Government construction was changed to that shown in drawing 74986. In the first construction shown in drawing 72294 a parachute set, such as shown in Plate VI attached to the stipulation, was used, but after May, 1922,

when the Government began to construct shells in accordance with drawing 74986, the multiple parachutes were abandoned and a parachute such as shown in drawing 74990 was used.

The referred-to drawings are annexed to the stipulation and are by reference made a part of this finding. Since November 23, 1918, the Navy Department has manufactured approximately 45,000 of the 3″ shells, 20,000 of the 4″ shells, and 10,000 of the 5″ shells.

XLIII. The star shells manufactured by the Government from the time of the termination of the contracts until May, 1922, comprised a projectile adapted to be shot from a rifled gun, which projectile provided an outer casing having at its front end a time fuse. An illuminating body combined with parachute elements was contained in the shell and was adapted for expulsion through its rear end by means of an expulsion charge at its forward end separated from the illuminant by a baffle plate. The baffle plate was provided with a plurality of perforations by virtue of which ignition was communicated from the expulsion charge to the ignition powder pellets embedded in the illuminant. The ignition powder pellets were of frusto-conical form, with their small ends directed toward the baffle plate. The illuminant and parachute were contained in multiple part segmental casings and had embedded in it for reinforcement purposes a spiral member. When the illuminant is expelled this segmental casing automatically separates. The parachute element was connected to the illuminant by means of a ball-bearing swivel member and comprised a series of parachutes arranged in tandem and of progressively increasing diameter. These parachutes were rolled together in such a way that the suspension parachutes were in the center of the roll. Around the suspension parachute was wound the flexible line connected with the illuminant. When the parachute unit went into action and was unwound, the smaller parachutes were adapted to enter into action first. The flight of the illuminant would accordingly be retarded slightly by the smallest retarding parachute that went into action. After this parachute had functioned to slow down the speed of the illuminant the following larger retarding parachute went

into action, still further slowing down the speed. By the time the suspension parachute went into action the speed would be decreased to such an extent that the parachute would be able to take the strain wihout slitting.

XLIV. The shells manufactured by the Government after May, 1922, comprised a projectile adapted to be fired from a rifled gun, the projectile containing an illuminant and parachute element adapted to be expelled from the rear end of the shell by means of an expulsion charge located at the front end and ignited by a time fuse. A perforated baffle plate was supplied between the illuminant and the expulsion charge and ignition of the illuminant was accomplished by flame from the expulsion charge passing through the perforations of the baffle plate and igniting powder pellets of frusto-conical form embedded in the illuminant, with their small ends adjacent to the baffle plate.

The illuminant and parachute were contained in multiple part segmental casings. When the illuminant is expelled the segmental casing automatically separates. The parachute structure was connected to the illuminant by means of a ball-bearing swivel member. The parachute element comprised but one member or parachute connected to the illuminant by the usual suspension members and in addition by a cord or element from the center of the parachute to the illuminant of such length that the parachute after ejection from the projectile would be partially turned inside out and in this position would function as a retarding member. A fuse link adapted to function a predetermined time after ejection released this cord, so altering the form of the parachute that all of its surface was rendered available for sustaining the illuminant.

XLV. On June 25, 1925, the following stipulation of the parties was filed:

"It is hereby agreed by the parties herein, in accordance with the usual practice of United States district courts in cases involving the validity of patents, that this case may proceed to trial and determination upon all issues herein involved, except the number of star shell containing the claimant's designs, which were manufactured by the United States after November 23, 1918, and that upon determina-

tion by the court of the other issues in the case, evidence may be taken upon the above point, if such evidence be pertinent under the findings made by the court upon the other points involved."

XLVI. Prior to the issuance of each of the Letters Patent Nos. 1305186, 1305187, 1305188, and 1381445, the applications therefor were assigned by Axel G. Bergman to the Ordnance Engineering Corporation, and said patents issued to the Ordnance Engineering Corporation as assignee of the said Axel G. Bergman.

XLVII. The court finds as an ultimate fact that plaintiff's rights as defined in claims 1, 2, 3, 4, 5, 6, 15, 16, and 17 of patent No. 1305186 were infringed by the Government in its manufacture of star shells after May 27, 1919, and prior to May, 1922; that plaintiff's rights as defined by claims 8, 9, 10, and 11 of the same patent were infringed after May 27, 1919, and May, 1922; and that plaintiff's rights as defined by claim 8 of patent No. 1305188 have been infringed from May 27, 1919, and subsequent to May, 1922.

The court decided that plaintiff was entitled to recover $35,000.00, additional judgment to be entered upon the filing of the report of the commissioner, to whom the case was referred for further proof.

BOOTH, *Chief Justice*, delivered the opinion of the court:

The plaintiff, a New Jersey corporation, sues to recover upon a number of items which may be best discussed in their order. The plaintiff in the summer of 1916 consulted with and interested the War Department in its previous experiments with the manufacture of illuminating shells. A demonstration of plaintiff's 2.18″ shell occurred in January, 1917. The War Department complimented plaintiff's achievements in this instance, and the written report to this effect was forwarded to the Bureau of Ordnance and to the British War Office. The War Department awarded a contract to the plaintiff to manufacture some star shells for a 2.75″ trench smooth-bore mortar, and thereafter the plaintiff continued its experimentations with other and additional designs. Plaintiff's chief engineer was directly responsible

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for its activities in star-shell designing and experimentation, and as will subsequently appear patents were applied for and granted covering the invention. Plaintiff's success with the War Department encouraged its contact with the Navy Department. On February 5, 1917, it requested the privilege of demonstrating the utility of its star shells to the department. The Navy Department had not accomplished success in obtaining a star shell for long-range guns. The department's difficulties were peculiar to its own style and caliber of ordnance, and of course the proper officials welcomed the plaintiff's suggestions. After some correspondence and personal interviews the plaintiff disclosed to the Navy Department its detailed drawings of a 3″ star shell, at the same time advising the department of its purpose to manufacture small star shells for unrifled cannon, which would develop the degree of velocity the department desired to obtain. The Navy could not utilize the trench mortar or the star shell developed for the War Department. The Navy was using high-velocity guns and star shells inserted therein had to be so designed as to meet this condition. Following a variety of changes and modifications, brought about by correspondence and interviews, the Navy Department in June, 1917, entered into an experimental contract with the plaintiff, contract #1099, for the manufacture of ten 3″ star shells of plaintiff's design. It is sufficient to say that shells covered by the contract proved unsatisfactory. Thereafter, upon receipt from the British Admiralty of the specifications and drawings of the British 4″ star shell, the department became convinced that such a shell was available, and invited proposals from the plaintiff to manufacture 25 such shells for experimental purposes. A contract was awarded the plaintiff for so doing on February 15, 1918, by the terms of which the plaintiff was to make 20 shells of each of two designs submitted by the British Admiralty, and five of its own design, i. e., 45 in all. Under this agreement plaintiff, with modified suggestions of its own, made and subjected to test the shells called for. The test was not satisfactory. Whereupon the plaintiff proceeded to perfect its own design, and as a result of a test the department was satisfied as to

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the plaintiff's 3″ and 4″ shells. Plans and drawings were furnished the proper bureau of the department, and in June, 1918, a contract was let, whereby the plaintiff was to manufacture and deliver 20,000 each of its 3″ and 4″ shells. It is this contract, to which all others are preliminary, known as #39716, subsequently supplemented by contract #39716-A, which gives rise to this litigation.

The manufacture of star, or, as technically known, illuminating shells, was an entirely new adventure in this country. The plaintiff's enterprise was pioneer in character and to accomplish success the Government agreed to a cost-plus contract which involved, among other items, the erection of a suitable plant upon a site at Baldwin, Nassau County, Long Island, near plaintiff's aeroplane and machine shops, the site to be provided by the Government. In addition to cost of plant the plaintiff was to be paid an engineering fee for services in connection therewith and also the cost of all experimental work carried on by plaintiff. It is to be noted that the original contract, No. 39716, was concerned alone with 3″ and 4″ star shells. Plaintiff had not at this time perfected to its satisfaction a 5″ star shell. The bureau also desired a 5″ shell. Without going into detail as set forth in Finding X, it is enough to say that contract No. 39716 was increased by contract No. 39716-A to include the manufacture of 5″ shells. Notwithstanding assurance that contract No. 39716 would be closed as of July 1, 1918, it was not signed by the Government until July 27, 1918. This delay, however, did not militate against the plaintiff's performance; on the contrary, plaintiff began preparations toward performance at once and proceeded to prepare and forward orders for materials and supplies. The manufacture of a delicate mechanism like a star shell, especially when in a more or less experimental state, compelled the consumption of much time in the fabrication of the essential materials. The plaintiff endeavored to anticipate this source of delay and forwarded to the bureau orders for materials, some prior to the execution of the contract. A contract made in the midde of the year 1918, irrespective of its subject matter or importance, was absolutely certain to encounter the delays incident to the establishment of boards and com-

missions vested with jurisdiction to conserve the national resources. This fact was publicly known. Materials were available only in many instances through the priority orders of the War Industries Board, and the processes of the bureau through its supplies and accounts division were the usual method of securing approval of purchase orders. Cost-plus contracts exacted strict inspection, and it was to be assumed by the contractor, knowledge of conditions being inescapable, that delays would occur. As a matter of fact, the table of delays set out in Finding XIV indicates what might have been anticipated. Of course, the Government was obligated to facilitate performance to the extent of its ability, but there is nothing in the record to warrant a holding that the interposition of this so-called "bureaucratic red tape" put the plaintiff to a decided disadvantage. The plant was in process of construction during this period; quantity production could not proceed until it was completed. A site for the same was to be condemned and a contract let to construct. Originally the estimated cost of the plant was fixed at $67,121.00, afterwards increased to $124,141.00. The numerous changes and additions to the original conception, keeping in mind the engineering fee of $2,000 paid the plaintiff, disclose a premature conception of the necessities of the plaintiff in the original plans for the building. At the time the contract was canceled the plant was substantially complete, but many details remained to be completed before quantity production could be attained. The plaintiff charges the delays in the performance of the contract were attributable to the defendant's inspectors. An allegation is made, and said to be supported by proof, that the naval inspector and his assistant detailed to inspect performance were incompetent; that they adhered too rigidly in minor matters to established bureau procedure, and constantly refrained from accepting responsibility in the matter of urgent authorizations for materials, etc. It is manifest from the record that intense hostility soon developed between the contractors and the inspector and his assistant. A most formidable record on this issue appears in the testimony. In reconciling this acute conflict it has been impossible for the court to fix the blame. It is to be said, however, that the contractor

was aware of the necessity for inspection, and it is to be observed that in addition to a cost-plus contract the article to be manufactured must meet the requirements of the contract in a way where test and inspection were vitally important factors. While time was of the essence of the contract, and the shells were urgently needed, nevertheless it may not escape attention that a successful star shell had not so far been designed, and the success of the venture depended upon cooperation between the parties. The inspectors were under obligations to speed up production and oversee manufacture; their responsibility is not to be minimized, and such a service when it runs counter to a contractor possessed of equal zeal and under the same weighty obligation, is clearly capable of producing friction. The court is of the opinion, that in so far as this relationship was responsible for delays, one party was about as equally to blame as the other. The Navy Department about October 4, 1918, desired the completion of 1,000 3″ shells for shipment abroad. The plaintiff responded to a request for expedition that it must change the design of the shell. This was finally done under an authorization to manufacture 5,000 of the changed design. The new design was tested at Indian Head on October 11, 1918, and was approved. None of these shells were made, however, for the reason that on November 23, 1918, plaintiff's contract was terminated. The letter terminating the contract ascribed two reasons for bringing it to an end: Unsatisfactory progress toward completion and the signing of the armistice. Clause 18 of the contract provided as follows:

"The department shall have the right to terminate this contract at any time as its interest may require: *Provided*, That if terminated before the completion of the work herein provided for a just and fair settlement shall be made with the contractors."

On November 23, 1918, the plaintiff by letter protested against the cancellation of its contract, pointed out a lack of delay upon its part, and asked to proceed therewith. The protest was of no avail. The bureau subsequent to termination obtained permission from the department to take over plaintiff's employees, i. e., such as the inspector

in charge deemed available to operate the plant, and they were afterwards transferred to the Government pay rolls. The plant was operated by the Government, a plant designated "The United States Naval Ordnance Plant, Baldwin, Long Island, N. Y.," and has been continued in operation as such. Practically all the plaintiff's possessions relating to the manufacture of shells, far too many to enumerate in detail (Finding XXII), passed into the Government's possession, and with the organization of plaintiff intact, except as to executive officials and the chief engineer, the Government within sixty days after termination was producing shells. Within 90 days thereafter the entire plant was in operation. (Finding XXII.)

The plaintiff predicates its right of recovery on this phase of the case by asserting proof of the fact that the acts of the Government in terminating the contract constituted bad faith, the plaintiff insisting that despite governmental interference it was proceeding in an orderly and expeditious way toward performance of the contract, and that the termination order was prompted by personal hostility toward the plaintiff, apparent from the reports and unjust recommendation of the inspector in charge and his assistant—reports and recommendations upon which the Government acted in terminating the contract. A judicial conclusion as to the establishment of bad faith must rest upon a substantial and convincing foundation. A court would not be justified in indulging the inference that responsible officers of the Government arbitrarily invaded plaintiff's contractual rights and exercised a reserved right to cancel a contract because of personal animosity toward the contractor, unless the proof adduced to sustain the charge is extremely clear and free from irreconcilable conflicts. *Ripley* v. *United States*, 220 U. S. 491. It is no more than just to the contractor to say that one reason given for termination, i. e., alleged delay in performance, is not sustained. The case, however, is not limited to the exercise of the right for this single reason; on the contrary, the termination clause is comprehensive and recites the right to terminate "as its interest may require." The Government enters into a war contract on a cost-plus basis; the right of termination is reserved "as its

interest may require." Proof conflicting and irreconcilable obtains as to friction and discord during the performance of the contract. The Government needs the ordnance and needs it badly; the prospect of cooperation is discouraging, when suddenly the war terminates. The needs of the Government become less acute, expense is accumulating, a prolongation of manufacture on a cost-plus basis may be deemed inadvisable, and the officials conclude that economy may follow termination, and innumerable other reasons enter into the question of the vital interest of the Government. When the court adds to the above consideration the fact that the ill feelings and conflict between the contractor and the inspectors *must be* shown to have influenced the officers of the department, whose subordinates they were, and carry into every detail of this particular transaction the element of bad faith, we find ourselves unable to do it. Obviously, the source of friction was due to plaintiff's impatience with departmental procedure. The plaintiff preferred direct dealings without the necessity of so many references and approvals. The inspectors on the other hand were not at liberty to waive these requirements, and the regulations and procedure of the department were not inimical to good faith in the matter of performing cost-plus contracts. The Government bore substantially all the expense and it had a right to establish means for its accurate ascertainment and requirement. The fact that the Government continued operations and within ninety days from the date of termination was producing star shells is convincing proof that with friction removed the difficulties in performance disappeared. We are convinced that the contention of the plaintiff, founded upon a breach of the contract on the basis of bad faith in its termination, is without merit. We think it was for the best interests of the Government to terminate the contract.

The termination clause of the contract provided "for a just and fair settlement" with the contractor. The provision is somewhat unique in that no specific basis for settlement is stated in the form of cost of materials, actual money paid out, etc. While it needs only a statement to demonstrate that items of this character are to be included in the

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settlement, the language used indicates a comprehension of something more than actual outlay. A just and fair settlement obviously contemplates remuneration as the equities of the case suggest. The Government has paid the plaintiff $263,011.23. (Finding XXVI.) This amount covers certain fixed charges and one item of profit. The plaintiff's contention for an additional allowance is rested upon a computation wherein the ratio of profit to total cost of performance is fixed at 8.56%. Prior to termination plaintiff had given and the department had approved orders in pursuance of which the plaintiff had entered into subcontracts totaling $556,001.09 and had entered into correspondence for the furnishing of materials, the value of which was $92,035.58, making a total of $648,036.67; 8.56% of this amount totals $55,471.94, and this sum is claimed as a fair and just settlement for services rendered in connection with the items mentioned. The defendant challenges the right and points out errors in the justness of the computation. The preliminaries of a new organization are of vital importance, especially so in a case of this nature. Superintendence of the erection of a building, and orders for plant equipment and materials, require a high degree of service, but, as emphasized by the defendant, this character of service falls upon the officials of the organization—it is overhead expense and is to be absorbed usually in profits realized. The plaintiff having been denied all its anticipated profits, a just and fair settlement, it contends, indisputably requires payment for such expense. The trouble with the plaintiff's contention is that it has been paid sums representing this expenditure. Whether in all respects it has been paid enough is another question. As to some of the items it is clear the plaintiff may not recover. The plaintiff agreed to accept $2,000 as an engineering fee in connection with the erection of the plant, and this sum it received. Factory overhead and general administrative expenses were fixed at $28,890.67, and this sum has been paid, evidently ascertained upon a proportionate basis of actual expenditures allocated to this contract, including salaries of the corporation's officials. It is difficult to perceive a more accurate ascertainment of facts

for reimbursement than allocation of overhead to the particular contract involved. At any rate, it is the established method. That plaintiff was fully reimbursed for expenditures for labor and materials is not denied. A profit upon completed work under the contract of $4,949.55 was paid. Plaintiff's claim of 8.56% of all outstanding obligations, as well as amounts expended, is a claim predicated upon profits rather than a showing of the value of services rendered. There was much more to be done by the plaintiff before it earned a profit of 10% under the contract, and the contract made no provision for the payment of profits upon materials ordered but not as yet used. The court is not to award damages. The plaintiff by signing the contract contemplated the situation which came about. The defendant's contention as to a just and fair settlement, except possibly one item, is apparently limited to reimbursement. The settlement made contained but one item of profit and is predicated wholly upon the inclusion in the sum allowed for general administrative and factory overhead as sufficient remuneration for services performed. This, we think, is not fair nor just. The defendant on the date of termination was enabled to avail itself of a competent organization, a substantial going concern, an organization adapted to the production of a single article salable with profit to a single customer, an identity worth more in its then condition than the cost of organization, certainly worth much more to the plaintiff. A smoothly functioning organization developed almost to the point of perfection would have a market value in excess of the sums expended to bring it to this point, and the defendant obtained this identical advantage. Therefore, in view of the wording of the termination clause and the intent of the parties in assenting to the same, it is not fair nor just to restrict compensation to the precise limits of remuneration. What we mean is illustrated by the fact that within 90 days after the termination of the contract the defendant, with the organization in substantially the same condition as when taken over, had attained quantity production. Surely within the meaning of justice and fairness the plaintiff is entitled to an allowance over and above cost for the loss of time and service expended in creating such a condition.

The defendant recognized the justice of such an allowance; it even now concedes an allowance for materials delivered but not incorporated in the work, and offered to plaintiff an additional $10,000 to cover all claims arising under the contract. The plaintiff declined the offer, asserting its inadequacy. We think the plaintiff was right. Aside from the issue involving patents, we think that the plaintiff would not be made whole without this additional allowance. It is somewhat difficult to fix the amount, but in view of the magnitude of the undertaking, the perplexing problems involved, and the amount of labor exacted, and also taking into consideration the sums expended and interest on borrowed money, we think $35,000 is fair and reasonable.

PATENT RIGHTS

The plaintiff alleges infringement of certain claims of four letters patent. The usual defenses are interposed and the case upon the issues presented brings forth a voluminous, contentious, and much involved record.

The plaintiff's assignor and chief engineer, Axel G. Bergman, filed on February 17, 1917, an application for a patent on certain new and useful improvements in illuminating projectiles. This application, #149260, finally on May 27, 1919, matured into issued patent #1305186 and divisional patent #1305188. Two other applications by the same inventor resulted in issued patents, viz, #1305187, on May 27, 1919, and #1381445 on June 14, 1921.

The first infringement claimed relates to claims 1, 2, 3, 4, 6, 8, 9, 10, 11, 15, 16, 17, and 18 of letters patent #1305186. The claims, we think, may be grouped. Claims 1, 2, 3, 4, and 6 are as follows:

1. A projectile having an illuminant, a sustaining device therefor and means adapted to check the speed of the illuminant at high velocities previously to the operation of the sustaining device.

2. A projectile having an illuminant, a sustaining device therefor, and a parachute adapted to check the speed at high velocities previously to the operation of the sustaining device.

3. An illuminating shell having a sustaining device and a retarding device for a portion of its contents operating previously to the sustaining device.

4. An illuminating shell having a sustaining parachute and a retarding parachute operating previously to the sustaining parachute.

6. An illuminating shell having a retarding parachute, means for bringing said parachute into operation, an illuminant, and a sustaining parachute for said illuminant acting after the operation of the retarding parachute.

The conception of the inventor, deducible from the claims now under consideration, is the recognition of the vital necessity for a sustaining device and a means to retard speed. A star shell discharged from ordnance encounters the force of the discharge of the projectile encasing the illuminating star shell and the great velocity attained by the projectile in its passage through the air. The difficulty from a practical point of view had long existed of perfecting devices capable of sustaining the destroying influence of the force of the discharge from the Navy's guns and so functioning in midflight as to sustain the illuminant a sufficient length of time to illuminate the desired area. A parachute had long since been employed as a sustaining device; the impediment in the way of its utilization in a star shell was its inability to sustain the illuminant in the air because of slitting or damage due to the excessive speed at which the projectile from the gun was traveling when the illuminating device was released therefrom. In other words, it was essential to first check the velocity of the star shell so that the parachute might open under conditions of less speed and thereby sustain the illuminant in the air, i. e., retard its progress towards the ground until the illuminating element had been consumed. All of the above claims clearly indicate a conception of the essential functioning elements of a device to attain the desired objective, and this was accomplished by the inventor specifying two separate elements, i. e., a retarding parachute, a means to retard speed, and a sustaining parachute to sustain the star. A small parachute, with means for bringing the same into operation, functioned

upon opening to check the speed of the illuminant and thereafter a larger parachute functioned to sustain the illuminant in the air to a degree of slower process in descending to the ground.

The invalidity of the foregoing claims is asserted. Seven patents relied upon as prior art are cited. Patent #1178304 granted to Dutcher April 4, 1916. The inventor discloses a device, a container for messages adapted to be dropped from an airplane. To accomplish the purpose a parachute arrangement is employed. Page 1, line 100, of the patent reads:

"When the signal is released it should fall rapidly and be little influenced by air currents until it is close to the earth, and in that way the signal can be prevented from drifting away from the point it is desired to deliver it."

The predominant conception of the inventor as disclosed was a mechanism adapted to deposit a message from an airplane in or near the exact location desired. The container contained an illuminant so that when the message was dropped at night it could be readily located. The parachute's part in the operation of the mechanism was adapted to unfold when the container had fallen to within 100 or 200 feet of the ground, and the purpose to be accomplished was to so retard the speed of the container that violent contact with the ground would not destroy the message but prevent loss of the same. The parachute arrangement involved a suspension of its functioning by being restrained or tied down near its middle part during the initial portion of the flight, with means to release it as it approached its destination.

The problem which confronted Bergman was not the retardation of speed toward the close of the flight. What Bergman did was to employ two elements—two parachutes—one functioning to check velocity during the initial portion of the flight and another to sustain the illuminant in the air the maximum period of time. The success of Dutcher's device depended upon speed, while Bergman was seeking to overcome the existence of the same. It was neither new nor novel to employ a parachute as a sustaining

device; the principle had long since been demonstrated. The examiner cited the Dutcher patent as a reference in the office action of May 3, 1918, and also referred to it in subsequent actions, finally allowing Bergman's claims in their present form.

The French addition patent 19368 and French patent 451289 utilize parachutes in a disclosure of a device designed to afford safe descent to the occupant of an airplane, as well as protect the plane itself in case of emergency. Patent 19368 embodies a structure comprised of a series of parachutes of decreasing size, the largest being attached to the top of the suspension parachute and the others being attached to the top of its predecessor. In this order they were encased in a tube and so arranged that when put to use the smallest one is first projected from the tube operating against air currents with sufficient force to draw from the tube the next one, and so on in succession until the final and large parachute is released. The inventor by the disclosure was seeking by this multiple arrangement of parachutes in series, and varying in size, to obtain certainty in operation of the final or large parachute relied upon to sustain the weight in supposed safe descent. It resembles the patent in suit to the extent of using multiple parachutes. There is no suggestion of the use of one or more of the *graduated smaller* parachutes to retard velocity or check the speed attained by an airplane or an airplane operator in emergency. Almost instant operation is essential, and the smaller parachutes were of course insufficient to sustain weight of any consequence. The aid they supplied in the relationship accorded them was to withdraw the dependable, the large one, from the container so that in its natural way it could unfold, the smaller parachute in no way contributing to the natural functioning of the large and dependable one. They might have been dispensed with without impairing in every instance the operation of the substantial parachute designed to retard speed and assure a safe landing. As a matter of fact, the whole conception indicated a design to obtain speedy and almost instant operation in the interest of assured safety. The inventor does not disclose the functioning of a parachute to *retard velocity* as a necessary

precedent and essential factor to afford operative effect to another one. The novelty is more a matter of arrangement rather than unusual operativeness. French patent 451289 is confined along the same lines and subject to the same limitations. A small parachute is utilized in combination with a large one to liberate the latter from a folded condition, releasing the means employed to compress the large parachute into its compact condition, so that it may promptly function. The relationship between the two parachutes was in nowise unusual. One, the smaller, functioned to release the *means adapted* to maintain the other—the larger—in a folded condition so that it would be free to function independently. The smaller parachute in no way contributed to the functioning of the larger one; its place in the patent was as an element to force from its bounds the larger one, strip it of the impediments to its instant operativeness, and thereafter the effectiveness of the larger one depended upon its own inherent qualities for proper functioning.

United States Patent to Maul, #757825, and British Patent #12772 to the same inventor present a parachute structure identical in function with Dutcher's patent #1178304 (*supra*). Dutcher's conception embodied the safe discharge of messages from high altitudes and Maul conceived the idea of photographs from an altitude of 1,600 or 1,700 feet. The means employed in both instances were not dissimilar.

United States patent #1186230 to Riches, embodying an aeronautical life-saving device disclosed a plurality of parachute sections ranging one below the other, each being of relatively larger proportion. The device functions in a manner identical with the disclosures in French addition patent #19368 and French patent #451289.

The United States patent #1207520 to Fabiani discloses again the employment of a plurality of parachutes functioning to lift or pull up a cross-member adapted to arm a bomb, a central idea being to time the discharge of the bomb in its course through the air before its contact with the ground. This patent was cited by the Patent Office in its first action on the Bergman application, which finally matured into patent #1305186. A British patent to Holt, #10816, is attempted to be utilized by the defendant as in-

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dicative of the fact that a signal provided with a parachute adapted to be dropped from an airplane is an analogous use to a signal adapted to be fired as a projectile. No attempt to use the patent as prior art is made, it being conceded that the date thereof precludes such a possibility.

The opportunity for invention, as limited by the group of claims now under discussion, is, we think, confined within a very narrow channel by the prior art. Bergman was confronted with a problem which entailed two predominant factors. A successful star shell timed to illuminate at any given point in the trajectory of the projectile discharged from a Navy gun necessitated a degree of retardation of the intense velocity of the illuminant prior to the operativeness of a sufficiently large parachute to sustain the same in the air. Prior experiments had demonstrated the ever-present factor of destructiveness due to the velocity of the shell. Without some means to retard velocity no sustaining parachute could withstand the intense pressure of the velocity of a shell discharged to reach a point miles distant from the location of the gun. It was not the question of using in the first instance a means to free a parachute from a container so that it might function normally. It involved the prime necessity of means for slowing down to the necessary extent the illuminant so that a sustaining parachute might operate at all. If you eliminate from Bergman's device the speed-retarding means so that a large parachute may function to sustain the illuminant, the problem so long under experiment remains unsolved. The prior art demonstrates beyond peradventure the availability of parachutes as a means to retard velocity and as sustaining devices, but there is nothing in the disclosures relied upon anticipatory that even remotely brings to the surface a suggestion of a conception of the employment of a parachute as a retarding factor adapted to afford operativeness to a sustaining parachute by preventing the destruction of the same. Inasmuch, therefore, as the necessities of the case called for a device adapted to function in this respect, in two separate and distinct ways, i. e., one to retard force as a condition precedent to effective operativeness, it is, we think, established that Bergman to this extent overcame the difficulties and created the combination. In so

doing Bergman undoubtedly employed elements old in the art, capable of being utilized as he utilized them, and if his alleged invention involves no more than imitation of existing uses or seizing upon a prior patent to adapt it to a double use, which those skilled in art would readily perceive, what he did was not invention. The issue turns upon "nonanalogous" or "analogous" use. The following syllabus from the case of *Canda* v. *Michigan Malleable Iron Co.*, 124 Fed. 486, is apropos:

"A patent otherwise valid is not void for anticipation because a prior patent covers a device which might be so constructed as to be capable of the same use as that of the later patent, where the prior patent gives no sign that such use was contemplated and no specific directions for such construction."

Again, in *Mallon et al.* v. *William C. Gregg & Co.*, 137 Fed. 68 (syllabus):

"The application of an old machine or combination to a new use is not in itself invention or the subject of a patent. It is only when the new use is so recondite, or so remote from that to which the old device has been applied or for which it was conceived, that its application to the new use would not occur to the trained mind of the ordinary mechanic skilled in the art seeking to devise means to perform the desired function with the old machine or combination before him, that its conception rises to the dignity of invention."

While the degree of remoteness in the art in the present instance is not emphatic, whatever else may be said it is indisputably true that, despite experimentation by the skilled mechanics of the Navy Department for some years in an effort to perfect star shells, the Bergman invention escaped them. Not only is this fact established, but in addition the Bergman invention proved to be practical, successfully operative, and of commercial value; thousands of star shells in accord therewith have been manufactured by the Government. Inventors who preceded Bergman in the use of multiple parachutes were concerned with overcoming difficulties of a different nature. Within the purview of their conceptions no disclosure indicates a utilization of multiple parachutes adapted, one as a retarding force to effectuate

the operativeness of a second sustaining one without damage in a swiftly moving projectile. In practically every single instance the combination of parachutes was designed to sustain weight, the use of additional ones was simply an added element adapted independently to exert force upon the one relied upon to assure its release from some convenient and compact manner of inclosure adapted to convenience in carriage. What was utilized was the balloon principle of descent, a combination in no way involving the complexities of releasing from a projectile fired from a high-powered Navy gun, a star shell, a device ejected from a projectile traveling at high speed and involving essentially the overcoming of the destructive qualities of intense velocity. The question of nonanalogous use we grant is quite a close one; nevertheless, in view of the record, we think it is sustained. Bergman, it seems to us, did conceive a new and novel use of plural parachutes, a use distinct from prior conceptions and involving invention. It was, to say the least, the application of a use, which had not theretofore suggested itself to those skilled in the art, notwithstanding a diligent search and persistent effort to solve the problem and produce a successful star shell.

Claims 8, 9, 10, and 11 form the second group. We reproduce them from the patent:

"8. A shell having an illuminating charge, means for expelling the illuminating charge out of the shell in a direction opposite to its line of flight, and means for sustaining the illuminating charge after expulsion.

"9. A shell having an illuminating charge and a sustaining parachute, means for expelling the charge and parachute out of the shell in a direction opposite its line of flight, and means for retaining the illuminating charge in fixed position within the shell previously to its expulsion.

"10. A shell having an illuminating charge and sustaining means therefor, means for expelling the charge and sustaining means out of the shell in a direction opposite to its line of flight, and means for retaining the illuminating charge fixedly within the shell previously to its expulsion therefrom.

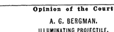
"11. An illuminating shell having a portion of its contents designed to be expelled therefrom, means for expelling said contents from the shell in a direction opposite to its line

of flight, and devices acting to retain said contents in fixed position within the shell previously to its expulsion therefrom."

The detail construction of Bergman's device is best disclosed by the inventor's drawings.

The number of elements essential to operativeness and the delicate arrangement of the parts employed suggest at once the opportunity for invention. As previously observed, the one important obstacle to overcome was force. The discharge of the shell from the gun set up a rotary motion of intense velocity and subjected it and its contents to great pressure. The essential element of the device was the *star*. Toward this illuminant all other means were directed, for if it failed to function the invention was worthless. Bergman by the terms of the above claims clearly discloses a new and novel method "of expelling the illuminating charge out of the shell in a direction opposite to its line of flight." In other words, he succeeded in ejecting the illuminant and the essential means to sustain it in the air by releasing the base of the shell and sending it backwards instead of forwards. By so doing he did, to a certain extent, counteract velocity and materially facilitated the operation of the device. Unquestionably he removed the danger of having the illuminant destroyed by the body of the shell, when the former had been expelled through the forward part or nose of the same. To accomplish this required a conception of a shell base of sufficient strength to withstand the shock of the initial firing in the gun, and at the same time yield to the expulsive pressure from within the shell. The defendant seeks to discredit the patent by citations from the prior art, which we believe requires little comment. British drawing #47 and others from the same source of a similar character were not received by the Navy Department until November, 1917, some nine months after Bergman filed his application, and were not available to the public anyway. The Noyes patent #52314 obviously has no bearing upon the Bergman invention. The Navy Department's drawings #2252 represent little else than an abandoned experiment, so that in our view of the record these claims stand forth as novel, involving invention and unimpeached.

Opinion of the Court


A. G. BERGMAN.
ILLUMINATING PROJECTILE.
APPLICATION FILED FEB. 17, 1917.

1,305,186. Patented May 27, 1919.

2 SHEETS—SHEET 2.

Fig. 4.

Fig. 5.

WITNESSES:

INVENTOR

Axel G. Bergman

By Attorneys,

Fraser, Turk & Myers

The next group involved consists of claims 15, 16, and 17:

"15. The combination of a projectile comprising an illuminating body, said projectile having means for sustaining the weight of the illuminating body which is of such fragility as to be incapable of overcoming the momentum of said body at high service speeds, and said projectile having means for overcoming such momentum of said body sufficiently to bring the latter within the capacity of said sustaining means.

"16. A high speed illuminating projectile for long range guns adapted to operate and ignite the illuminant at any one of a number of different points in the trajectory of the projectile as predetermined by the user, and means for retarding and subsequently sustaining the illuminant at any such predetermined point, the retarding element being adapted to relieve the sustaining element of excess strain.

"17. A high speed illuminating projectile for long range guns containing an illuminant, and timing means for igniting the illuminant, said timing means adapted to operate at any one of a number of different points in the trajectory of the projectile, and means for retarding and subsequently sustaining the illuminant at any such predetermined point, the retarding element being adapted to relieve the sustaining element of excess strain."

Claim 15 is manifestly similar to claim 1 of the first group. The difference is an amplification or rather a limiting functional statement with respect to the sustaining and retarding means, i. e., the multiple parachutes. It points out definitely the fragility of the sustaining device and emphasizes the necessity of overcoming momentum. The challenge to the claim's validity is predicated upon the same citations and assertions urged against claim 1, as heretofore discussed.

Claims 16 and 17 disclose practically the same combination as claim 15, adding thereto the illumination and ignition of the illuminant at any one of a number of different points in the trajectory. Ignition is accomplished by a time fuse or mechanism, and embraces within the disclosure a more specific claim for the shell mechanism than is disclosed in the first group of claims. While time fuses are old, we think the novelty predicated upon the combination of elements set forth in claim 1 is sufficient to carry claims 16 and 17, irrespective of this additional element.

Claim 5 reads as follows:

"5. An illuminating shell having a retarding device adapted to check the speed of a portion of its contents at high velocities, a timing device adapted to set in operation said retarding device, and a sustaining device which acts after the retarding device."

This claim simply employs broader phraseology than claim 17. If one is valid, we think validity attaches to the other.

Infringement is also predicated upon claim 18. The claim includes as an element "means for preventing the tumbling of the shell." By reference to the specification and drawing of the patent, this element is found in the vane *d* appended to the rear of the shell and functions as the feathers of an arrow. No such structure is found in the Government shell in which tumbling is prevented by the rotation or spinning of the shell imparted to it by the rifling in the gun from which it is fired. Defendant attempts to read this phrase upon the copper band of the shell, but this is, we think, tortuous, and this claim is therefore considered not infringed, and no discussion of its validity is necessary.

PATENT #1305188

This patent, as previously observed, is a division of the application which materialized into patent #1305186. Three claims, 1, 3, and 8, of the patent are alleged to have been infringed. The claims read as follows:

"1. An illuminating projectile having an outer casing, an inner casing, a retarding parachute fastened to said inner casing, an illuminant within said inner casing, and a sustaining parachute also within said inner casing, and connected to said illuminant.

"3. A projectile having an illuminant contained therein and an automatically separable rigid wall positioned laterally of the illuminant and acting to protect the illuminant from excessive explosive shocks.

"8. An illuminating projectile containing an illuminant and sustaining means adapted to be discharged therefrom, an expelling charge, and separable means cooperating with said illuminant and sustaining means and acting to house the illuminant and sustaining means and also to receive the

force of said expelling charge, whereby said contents can be discharged from the projectile without receiving a direct strain."

Claim 1 is clearly not infringed, for it calls for a construction involving a retarding parachute fastened to an inner casing and a sustaining parachute within said inner casing and connected to an illuminant also within the inner casing. No such construction is found in any of the Government structures. The plaintiff evidently appreciates this, for on page 2554 of its brief the statement is made that "claims 3 and 8 are relied upon." This claim is not infringed.

United States patent to Ziegenfuss, #1003082, is said by the defendant to be anticipatory of claim 3. Ziegenfuss does disclose a star shell in which a plurality of segmental wings of rigid material are folded in an overlapping manner, thus forming a segmental inner casing around the illuminant. When the shell bursts, by virtue of a time fuse, these segmental members are spread out by means of springs so that they will function as a kind of parachute during the falling of the illuminant or "candles," of which there are several. From the construction shown, these segmental wings form an automatically separable rigid wall positioned laterally of the illuminant, and obviously function as disclosed in claim 3 of the above patent. The claim for this reason we believe to be invalid.

Claim 8 is much more specific in phraseology than claim 3; it discloses the "separable means cooperating with the illuminant," but in addition includes a sustaining means, so that this claim differs from the Ziegenfuss claim in specifically calling for additional elements not present therein.

Defendant also cites British drawing #24843. This drawing is referred to in Finding XL. We have heretofore pointed out that the same was not available to the public at the time Bergman made his application. We think claim 8 to be valid and infringed.

PATENTS #1305187 AND 1381445

The application for patent #1305187 was filed on January 6, 1919; letters patent were issued May 27, 1919. Plaintiff alleges infringement of claims 1 to 29, inclusive.

Opinion of the Court

The application for patent #1381445 was filed on July 20, 1919; letters patent were issued June 14, 1921. Infringement is claimed.

An extended discussion of the patents is unnecessary. Both of the above disclosures embody improvements over the prior patents of the inventor, and were the result, we think, of the experimental and development contracts entered into with the Government, which the Government financed in addition to paying the plaintiff a wholesome and remunerative consideration for the development accomplished. In considering the general question of infringement, these same experimental contracts are relied upon by the Government to preclude a judgment for infringement of any patent rights involved, on the theory of an implied license to use. The proceedings antedating the principal contract in the case disclose certain preliminary negotiations. (Findings II, III, IV, V, VI, VII, and VIII.) The Navy Department's experimentations had failed to develop a star shell suitable for use in its long-range guns of high velocity. The department's structure yielded to the force of the "set-back" and the mechanism was crushed to an extent to render it inoperative. Bergman's invention interested the department and through conferences and communications it was finally resolved on June 11, 1917, to enter into a contract, known as #1099, by the terms of which the plaintiff agreed to manufacture ten 3″ star shells of its own design for $5,000.00, the Bureau to furnish shell bodies, standard 3″ shrapnel nose pieces and fuses. The contract demonstrated, if not the impossibility, at least the impracticability of utilizing the Navy shell for the desired purpose. The nose-ejection type of naval shell could not be modified into a base ejection shell, and the plaintiff resorted to its own type as specified in Bergman's first patent. These last shells were successfully tested and duly inspected.

In November, 1917, the department received the British drawings for a 4″ star shell. Proposals were solicited from the plaintiff for the manufacture of 40,000 4″ star shells to be based upon the British design, and 60,000 3″ shells of the same design. Thereafter, it was discovered that the

British shell did not function satisfactorily, and the plaintiff and defendant entered into a second experimental contract #35072 signed February 15, 1918. This contract embraced the development of 25 3″ and 25 4″ shells along the lines of the British design with such essential modifications as would render them suitable to the shell body furnished by the department. The effort resulted in a final modification of the contract itself by the terms of which the plaintiff was to manufacture 20 each of the several sizes based on the British design, and 5 each of the several sizes based upon its own design. The 20 based on the British design proved unsatisfactory; the 5 of its own design were tested and proved satisfactory. The plaintiff prepared drawings of its own design and at once submitted them to the department. Subsequently on June 17, 1918, contract #39716—the contract involved in the case—came into existence. During the course of these experimental contracts the improvements covered by patents 1305187 and 1381445 were the result of the necessity to overcome the difficulties and imperfections disclosed during the course thereof. Except for the development processes carried on at the expense of the Government, under its supervision and with its suggestions in collaboration and contractual relationship with the plaintiff, these patents would not have come into existence. We need not multiply the citation of authorities to sustain the rule that where one is employed by another for development and experimental work the result of the relationship is an implied license to the employer to use whatever invention develops from the experiment. As stated in defendant's brief: "An employee employed to invent creates for his employer, and an equitable ownership of the employer in the employee's creation will be enforced." *Solomons* v. *United States*, 137 U. S. 342; *McKinnon Chain Co.* v. *American Chain Co.*, 259 Fed. 873. As to patents 1305187 and 1381445, the charge of infringement fails.

INFRINGEMENT OF PATENTS #1305186 AND 1305188

Quite a different situation obtains with reference to the existence of an implied license to use when applied to the

Opinion of the Court

above patents. These two patents were not conceived as a result of the experimental contracts. They antedate the processes of experimentation. It is true that the experimental contracts disclosed their utility for the desired purpose, but the invention itself had been at least constructively reduced to practice through the filing of the application for patent on February 17, 1917, and the experimental contracts relied upon were not executed until June 11, 1917. It is true the plaintiff had been engaged prior to this time in experimental work with the War Department for the development of star shells suited to the department's needs, but the problem presented by the use adaptable to Army and Navy guns varied materially, and there is nothing surrounding the contractual relationship of the parties at this early date which indicates the development of the patents as a result thereof. The sequence of events set forth in the findings conclusively discloses that the above inventions were the independent conception of the inventor, prior to and without the aid and benefit derived from the experimental contracts antedating the principal contract. The original application, #149260, which matured into patent #1305186 and divisional patent #1305188, was filed the same day as the first interview with the Navy Department, having been effected several days prior thereto, an interview which finally culminated in the experimental contracts, and they in turn culminated in a demonstration to the satisfaction of the department of the utility of the patents and a contract for quantity production. On November 23, 1918, these contracts, #39716 and 39716-A, were terminated by the defendant. On the date of termination the plaintiff had 1,000 shells about 82% complete, and in a short time would have delivered the same. The exercise of the right to terminate of course set aside the contract, and the reasons assigned clearly import an intention upon the part of the defendant to avail itself of this unilateral provision because of an alleged delay in performance and the termination of the war. The contract contains no provisions authorizing the defendant to proceed in the manufacture of star shells in accord with plaintiff's design in the event of termination. The nearest approach to such a right, and the provision upon which the defendant relies for a license to

use the plaintiff's patents, are found in subparagraph (e) of contract #39716, as follows:

"(e) Cost of necessary machinery and equipment, patterns, and drawings, and temporary structures needed for the utilization and protection thereof acquired exclusively for and devoted solely to Navy work: *Provided*, That the acquisition or construction of all such property by the contractors shall be approved in advance by the department. The title to all such property shall, without further payment on the part of the department, vest in the department, and on termination of the contract the department may remove such machinery and equipment, patterns and drawings, and the materials of such temporary structures, or it may sell the same as provided by law. All materials, machinery, equipment, patterns, drawings, appurtenances, supplies, etc., paid for under this contract by the department become thereby the sole property of the department and are left in the possession of the contractors only for the purpose of this contract, and such machinery, equipment, patterns, drawings, and temporary structures shall be devoted exclusively to the purposes of this contract."

As previously observed, contract 39716 was a cost-plus contract, and doubtless without this express reservation the materials purchased by the Government for the performance of the contract belonged to the Government. Aside, however, from this fact, we are unable to discover from the terms of the reservation the grant of a license to use patents—i. e., an express grant. A different situation would exist if the contract provided that in the event of default upon the part of the contractor the defendant might continue by itself or another the manufacture of star shells until the full contract quantity was completed, and recoup the loss from the contractor. The termination clause invoked by the defendant put an end to the contract, released the contractor, and placed the parties back in the situation obtaining prior to the contract. The reservation clause, we think, accomplished no more than a retention in the Government of title to all the materials of the character enumerated, and restricted the use of all materials purchased by the Government to the performance of the contract. To extend the provisions of this clause to either an express or implied license to use a patented device under a cost-plus contract to

manufacture the same would, it seems to us, be the equivalent of converting a wholesome and manifestly precautionary covenant into an indefinite license to make and use whatever sort of a device the materials were available to make. The materials covered by the clause possessed salvage and utility value, consisting of electric motors, screw machines, hydraulic presses, dryers, etc., etc., machines and equipment of standard design and capable of being used for a variety of purposes other than the manufacture of star shells. The abundance of the prior art cited in this case by the defendant clearly establishes that the star shell inventions covered by patents #1305186 and #1305188 are but *limited improvements*, in no sense basic, and obviously there existed in the prior art many other illuminating shells which the defendant was free to manufacture with this very machinery and materials. As a matter of fact, the defendant did this very thing, when of its own motion it changed the design. The defendant's insistence that acquisition of title to the drawings and specifications of the patent carries with it the right of user falls clearly within the same category. The defendant had advanced and paid the expense incurred in making the same. The contract imposed this obligation upon the defendant, but surely the title to drawings and specifications of a patent confers no right of user. Possession and title to the same was valuable to the defendant and subsequent events proved their worth.

It is to be noted that we have discussed the issue as to infringement of patents #1305186 and #1305188 on the basis of an issued patent. As a matter of fact, both patents were not issued until May 27, 1919, some time after termination of contract #39716. Therefore the case is again complicated with the determination of the question as to whether the plaintiff may claim infringement prior to the issue of letters patent under the act of October 6, 1917 (40 Stat. 394). This act reads as follows:

"That whenever during a time when the United States is at war the publication of an invention by the granting of a patent might, in the opinion of the Commissioner of Patents, be detrimental to the public safety or defense or might assist the enemy or endanger the successful prosecution of the war

Opinion of the Court

he may order that the invention be kept secret and withhold the grant of a patent until the termination of the war: *Provided*, That the invention disclosed in the application for said patent may be held abandoned upon it being established before or by the commissioner that in violation of said order said invention has been published or that an application for a patent therefor has been filed in a foreign country by the inventor or his assigns or legal representatives, without the consent or approval of the Commissioner of Patents, or under a license of the Secretary of Commerce as provided by law.

"When an applicant whose patent is withheld as herein provided and who faithfully obeys the order of the Commissioner of Patents above referred to shall tender his invention to the Government of the United States for its use, he shall, if and when he ultimately received a patent, have the right to sue for compensation in the Court of Claims, such right to compensation to begin from the date of the use of the invention by the Government."

Bergman's first application, #149260, was filed February 17, 1917. On January 9, 1918, plaintiff received the secrecy order under the foregoing statute. (Finding XXXIII.) The secrecy order was rescinded December 20, 1918. The defendant asserts no charge of a failure upon the part of the plaintiff to observe secrecy, or in any manner disregard the inhibitions of the statute. The defense interposed is rested upon a failure to make a tender of the patent to the Government for use, and that the file wrapper and contents indicating procedure in the Patent Office demonstrate the inapplicability of the act. The plaintiff, on the other hand, alleges the series of disclosures and experimental contracts which finally resulted in contract 39716 and supplemental contract 39716-A as sufficient to constitute a tender. The requirement of a tender of an invention was, we think, regarded by Congress as an essential condition precedent to the right of recovery under the statute, because it afforded advance notice to the Government and the option to use or not use. The statute clearly contemplates a real tender—i. e., the bringing to the attention of the Government the essential facts with reference to the invention so that subsequent use of the invention may prevail with knowledge of liability for the same. We can not read this provision out

of the statute. The plaintiff relies in part upon the disclosures repeatedly made in its plans, designs, and specifications to the defendant, as well as knowledge gained by the defendant through the experimental contracts. What facts constitute a tender is not always an issue of easy determination. In this case revolving around this particular point is the pertinent fact that the application for the patent, i. e., applicatión #149260, was filed February 17, 1917, prior to the happening of the events relied upon to establish tender, and nowhere do we find an express tender of the invention to the Government. The negotiations pending at the time looked to express contracts; the plaintiff was concerned in securing express contracts, and the idea of user in response to a tender does not appear to have been within the contemplation of the parties. It is true that on November 20, 1917, the plaintiff addressed the letter set out in Finding XXXIV to the defendant, and emphasis is laid upon this fact as establishing tender; but this contention we think is untenable. In the first place, at the time the letter was written no secrecy order had issued from the Patent Office. The secrecy order is dated January 9, 1918, more than a month after the letter was written. The contents of the letter simply disclose an opinion that the application for a patent covers the idea of ejecting the lights through the rear of the shell, and assures the Government that the purpose of the plaintiff is simply to bring to the attention of the Government the existence of this fact without intending to interpose the same between the country and its needs. Just what is meant by the last clause is not evident. However, calling the attention of the Government to a pending application for a patent and the scope of the same, coupled with an assertion that patent rights if granted will not be taken advantage of in time of war, is not a compliance with a statute prescribing a tender for use of a patent at the time not granted, and especially so when no injunction of secrecy obtained and no necessity for tender existed. The act extends a remedy under prescribed conditions, and until the conditions exist we see no way to anticipate them. The tender under the law follows the secrecy order; in the absence of a secrecy order the parties are at liberty to deal upon

the usual and customary basis as prescribed by the patent laws. The act of October 6, 1917, is special legislation covering unusual conditions and effective only when complied with.

While drawings, plans, and specifications disclose the detail of construction, they did not in this case warn the Government that user of the same involved an application to patent the device described. What happened herein was a series of experiments, an extended exchange of ideas, plans, and drawings, a mutual effort to arrive at perfection. True, it finally resulted in an express contract to manufacture by the plaintiff of its own design. Such a contract precluded the recovery of royalties under the law, or compensation under the act of October 6, 1917. The plaintiff accepted the consideration stated in the contract, not upon the basis of a monopoly of the device to be made, but predicated upon the manufacture of star shells, as shown by its submitted drawings and plans. The plaintiff was displeased with the termination of the contract and possessed full knowledge of the subsequent proceedings of the defendant, but at no time subsequent to the secrecy order warned the defendant that it was using, or tendered for use, an invention for which an application to patent had been previously filed. So that, under the facts, we think the issue of infringement is limited to a period subsequent to the date of issue of the patent. *Zeidler* v. *United States*, 61 C. Cls. 537; *Allgrunn* v. *United States*, decided by this court June 18, 1928. [67 C. Cls. 1.]

CLAIMS INFRINGED

Claims 1, 2, 3, 4, and 6 of patent #1305186 cover the conception of multiple parachutes, one as a retarding and the other a sustaining device, claims heretofore discussed on the issue of validity. It is, we think, sufficient to say that such a structure was manufactured by the Government from the beginning of their production until the Government in May, 1922, changed the design. (Findings XLIII and XLIV.) The contracts, #39716 and 39716–A, were terminated November 23, 1918, and the Navy Department began manufacture at once. Compensation for the use for the period of

time extending from the execution to the termination of the contract is included in the $35,000.00 awarded the plaintiff as fair and just settlement. Subsequent to termination the Government continued to manufacture star shells embodying the plaintiff's invention and infringement of the above claims by manufacture is found from May 27, 1919, the date of issuance of patent #1305186, until May, 1922, when the Government changed the design to the use of a single parachute so designed that after ejection from the projectile it was partially turned inside out and a minimum of its surface exposed. A fuse link adapted to function at a predetermined period after ejection released a binding cord, thus enabling the parachute to spread so that its entire surface was available as a sustaining element for the illuminant. The novelty of claims 1, 2, 3, 4, and 6 resides in the use of multiple parachutes. The claims, as heretofore observed, were restricted and narrow; therefore, it is our conclusion that the Government's device subsequent to May, 1922, does not infringe these claims.

Claims 8, 9, 10, and 11 of patent #1305186 embody a broader conception than the preceding group. It was, we think, decidedly new and novel to successfully invent what we may designate as the "rear-ejection claims." In view of the prior art, the rear ejection feature had not been accomplished before. This group of claims has been continuously infringed from May 27, 1919, at least to the date of filing the petition in this case. (Findings XLIII and XLIV.)

The final group of claims, 15, 16, and 17 of patent #1305186, is quite similar to claims 1, 2, 3, 4, and 6 of the same patent. The difference is principally involved in a phraseology emphasizing the operation at service speeds or at different points in the trajectory, as hereinbefore discussed. Claim 15 is directed to the sustaining and retarding means and is therefore only infringed by shells manufactured between May 27, 1919, and May, 1922. Claims 16 and 17 provide "means for retarding and subsequently sustaining the illuminant at any such predetermined point." This, we think, limits the prior claims to the extent at least of a conception which includes within its scope not only a retarding and sustaining device, but the addition of means

to function the illuminant at any predetermined period of time in its flight. Whether these claims are broad enough to cover the use of a single means for accomplishing the same purpose, as used by the Government subsequent to May, 1922, is, we must concede, doubtful. The subsequent separate references in these claims to a " retarding element " and a " sustaining element " impose a clear limitation on the word " means," and indicate a concept of the two individual elements. Under these circumstances, we are inclined towards the view that claims 16 and 17 may not be extended to cover the device manufactured by the Government subsequent to May, 1922. The claims when considered with the prior group, 1, 2, 3, 4, and 6, in the light of the specifications and claims asserted with respect to retarding and sustaining devices, obviously limit the inventive conception to multiple parachutes to accomplish the purpose. The use of a single element adapted towards this end seems to have escaped the patentee; the language of the patent precludes a reading of the claims on the single parachute used by the Government after May, 1922.

Claim 5 falls within the same category as claims 1, 2, 3, 4, and 6.

PATENT #1305188

Claim 1 of this patent is not infringed. The claim is limited to a structure involving a retarding parachute attached to an inner casing and a sustaining parachute within the inner casing. The defendant did not use a device either identical or similar to the one claimed.

Claim 3, as hereinbefore held, is anticipated and invalid.

Claim 8 is more troublesome. The claim is directed to the separable means for housing the illuminant in the shell, which housing is adapted to receive the force of the expelling charge. The record sustains the use by the Government of an illuminant contained in a multiple part segmental casing. The Government unquestionably inclosed the illuminant and the parachute in a segmental casing. (Finding XLIII and XLIV.) This was done prior and subsequent to May, 1922. The claim may not be limited to the multiple parachute system; it is broader, and we think is capable of

Syllabus

being read upon the Government device, manufactured both prior to and after May, 1922.

What we hold is that claims 1, 2, 3, 4, 5, 6, 15, 16, and 17 of patent #1305186 were infringed by the Government in the manufacture of star shells after May 27, 1919, and prior to May, 1922; that claims 8, 9, 10, and 11 of the same patent have been infringed *after* May 27, 1919, and May, 1922, and that claim 8 of patent #1305188 has been infringed both prior and subsequent to May, 1922.

There are many other questions discussed in the briefs. To give express attention to each would involve this opinion in additional complications of great length. The court has gone over each with careful attention. A record like the one in this case, covering a volume of testimony and exhibits of exceptional size, exacts extensive findings. The court has gone over the requests as carefully as possible and condensed the same within all possible limits. The parties having stipulated that, in the event of a favorable finding for the plaintiff as to the patents involved herein, the case is to be remanded for proof as to damages upon this single issue, in accord with the opinion of the court the conclusion attached to this opinion carries out this stipulation, and an order of the court will be made referring the case to Commissioner Hayner H. Gordon for further proof, as herein stated.

SINNOTT, *Judge*, and GREEN, *Judge*, concur.

GRAHAM, *Judge*, took no part in the decision of this case; MOSS, *Judge*, took no part on account of illness.

AUTOQUIP MANUFACTURING CO. v. THE UNITED STATES [1]

[No. H-448. Decided June 10, 1929]

On the Proofs

Excise tax; automobile parts or accessories; air pumps.—Air pumps manufactured and sold by plaintiff, specially adaptable and designed with the purpose of being sold for use by automobile operators in the inflating of tires, and so advertised, and con-

[1] Certiorari denied.

Reporter's Statement of the Case

structed so as to be carried with an automobile as a part of the tool equipment, *held* to be taxable as automobile accessories, notwithstanding they could be and were used for other purposes.

Same; antirattlers.—Antirattlers manufactured and sold by the plaintiff, particularly adaptable and designed for use in holding windows of inclosed automobiles in a fixed position, and so advertised, *held* taxable under the statutes imposing a tax on automobile parts or accessories.

The Reporter's statement of the case:

Mr. George M. Wilmeth for the plaintiff.

Mr. Ralph C. Williamson, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. Arthur J. Iles* was on the brief.

The court made special findings of fact, as follows:

I. Plaintiff during the times hereinafter mentioned was, and is now, a corporation under the laws of the State of New York, engaged in the manufacture and sale of air pumps and window antirattlers; its officers were and are loyal citizens of the United States, and it is the sole owner of the claim the subject of this suit.

II. Plaintiff made and filed its manufacturer's excise-tax returns monthly for the period July, 1919, to February, 1926, inclusive, showing the amount of tax due thereon, which was duly assessed on such returns by the Commissioner of Internal Revenue, paid by plaintiff, for the months, in the amounts, and on the dates hereinafter set forth, as follows:

Period	Year	Month	Year	Page	Line	Amount	Date paid
July	1919	Sept	1919	360	4	$59.22	9-12-19
Aug		Oct		20	1	91.66	10-6-19
Sept		Oct		370	6	90.75	10-30-19
Oct		Dec		5	7	138.21	12-3-19
Nov		Dec		220	5	70.22	12-31-19
Dec		Jan	1920	250	8	35.98	1-31-20
Jan	1920	Feb		151	1	51.20	2-28-20
Feb		Mar		152	2	93.96	3-31-20
Mar		Apr		201	0	76.14	4-30-20
Apr		June		11	8	70.11	6-1-20
May		June		43	2	59.08	6-30-20
June		Aug		1	5	70.21	8-4-20
July		Aug		42	0	171.62	8-31-20
Aug		Sept		45	2	163.17	9-30-20
Sept		Nov		2	7	142.41	11-1-20
Oct		Dec		1	8	146.74	12-1-20
Nov		Jan	1921	1	4	132.85	1-4-21
Dec		Feb		1	9	102.22	2-2-21

Reporter's Statement of the Case

Period	Year	Month	Year	Page	Line	Amount	Date paid
Jan	1921	Mar		10	2	$41.33	3-3-21
Feb		Apr		3	3	116.04	3-31-21
Mar		Apr		45	0	154.36	4-30-21
Apr		June		7	7	165.45	5-31-21
May		June		41	4	71.19	6-30-21
June		Aug		2	0	132.75	8-1-21
July		Sept		2	3	167.78	8-31-21
Aug		Oct		2	9	126.52	9-30-21
Sept		Nov		13	1	116.89	10-3-21
Oct		Dec		12	6	92.79	11-30-21
Nov		Dec		60	7	89.34	12-31-21
Dec		Feb	1922	1	9	112.32	1-31-22
Jan	1922	Mar		1	9	78.72	2-28-22
Feb		Apr		8	8	55.20	3-31-22
Mar		May		1	4	97.69	5-1-22
Apr		May		42	5	117.49	5-29-22
May		June		52	2	138.59	6-30-22
June		Aug		9	9	202.86	7-31-22
July		Sept		9	3	118.91	8-31-22
Aug		Oct		2	8	114.10	9-30-22
Sept		Nov		8	7	86.35	11-2-22
Oct		Dec		2	5	124.33	12-1-22
Nov		Dec		50	8	97.60	12-30-22
Dec		Jan	1923	54	7	162.67	1-31-23
Jan	1923	Feb		41	7	112.82	2-28-23
Feb		Apr		2	3	145.77	4-2-23
Mar		Apr		44	1	117.62	4-30-23
Apr		June		12	7	123.21	5-31-23
May		July		1	2	161.00	6-30-23
June		Aug		1	4	169.06	7-31-23
July		Sept		9	6	143.34	8-31-23
Aug		Sept		42	1	116.12	9-29-23
Sept		Nov		3	9	152.92	10-31-23
Oct		Dec		2	7	163.40	11-30-23
Nov		Dec		57	2	139.72	12-31-23
Dec		Jan	1924	63	7	145.49	1-31-24
Jan	1924	Feb		55	4	157.95	2-29-24
Feb		Apr		1	3	141.72	3-31-24
Mar		Apr		57	1	154.49	4-30-24
Apr		June		2	2	166.14	5-31-24
May		June		46	2	194.55	6-30-24
June		Aug		20	5	217.12	7-31-24
July		Sept		5	4	79.67	9-2-24
Aug		Sept		32	5	80.29	9-30-24
Sept		Oct		38	7	104.83	10-31-24
Oct		Nov		22	4	113.52	11-29-24
Nov		Dec		38	0	108.12	12-31-24
Dec		Feb	1925	0	8	84.30	1-31-25
Jan	1925	Feb		15	1	62.52	2-2-25
Feb		Mar		18	1	63.02	3-31 25
Mar		Apr		18	0	67.18	4-30-25
Apr		June		6	4	84.22	6-1-25
May		July		26	3	108.96	6-30-25
June		July		18	7	94.92	7-30-25
July		Aug		18	9	102.62	8-31-25
Aug		Sept		15	0	119.57	9-30-25
Sept		Oct		16	2	92.32	10-31-25
Oct		Nov		13	5	108.07	11-30-25
Nov		Jan	1926	1	7	120.55	12-31-25
Dec		Feb		1	5	74.38	1-30-26
Jan	1926	Mar		1	5	42.95	3-1-26
Feb		Apr		2	0	62.77	3-31-26

III. Plaintiff filed claims with the Commissioner of Internal Revenue, seeking refund for taxes paid on air pumps, on the dates and in amounts as follows: On September 28, 1923, for $2,687.09 for the period July, 1919, to June, 1923,

which was denied on March 4, 1924; on October 11, 1923, for $138.21 for the period October, 1919, to May, 1920, denied on March 17, 1924; on October 11, 1923, for $59.08 for period May, 1920, denied April 3, 1924; and on September 13, 1926, for $861.27 for the period July, 1923, to February, 1926, and denied on March 24, 1927, making the total amount claimed on air pumps to be $3,745.65.

IV. Plaintiff also filed claim with the Commissioner of Internal Revenue seeking refund for taxes paid on window antirattlers, for the period July, 1922, to February, 1926, amounting to $2,641.85, which was denied February 14, 1927.

V. The air pumps manufactured and sold by plaintiff, which were the subject matter of the taxes involved in this case, while they could be and were used for other purposes, were specially adaptable and designed with the purpose of being sold for use by automobile operators in the inflating of pneumatic tires, and were so advertised. Said pumps were so constructed as to be carried with an automobile as a part of the tool equipment.

VI. Plaintiff during the period in question manufactured and sold certain types of devices known as antirattlers, which were particularly adaptable and design for use in holding windows of enclosed automobiles in a fixed position and were so advertised. Other types of window antirattlers manufactured and sold by plaintiff during the period in question were not taxed.

VII. The total amount of taxes paid by plaintiff to defendant on air pumps from September, 1923, to September 13, 1926, was $3,745.65, and the total amount of taxes paid on the antirattlers was $2,641.85.

The court decided that plaintiff was not entitled to recover.

MEMORANDUM BY THE COURT

This case is controlled by the decisions of this court in *Walker Manufacturing Co.* v. *United States*, 65 C. Cls. 394; *Cole Storage Battery Co.* v. *United States*, 65 C. Cls. 164; *Advance Automobile Accessories Corp.* v. *United States*, No.

H-3, decided October 22, 1928 [66 C. Cls. 304]; *Borg & Beck Co.* v. *United States*, No. H-437, decided March 11, 1929 [67 C. Cls. 242]; *Edison Storage Battery Co.* v. *United States*, No. F-359, decided May 6, 1929 [67 C. Cls. 543].

Plaintiff's petition should be dismissed. It is so ordered.

BASSICK MANUFACTURING CO. v. THE UNITED STATES[1]

[No. J-114. Decided June 10, 1929]

On the Proofs

Excise tax; automobile parts or accessories; gascolators.—Plaintiff's gascolator (gasoline strainer) manufactured and sold by it to and used by airplane, farm implement, automobile and industrial machinery manufacturers, and interchangeable on any internal-combustion engine dependent upon the size of the fuel pipe and upon the adapter, and advertised by plaintiff as adaptable for use on designated makes of automobiles, *held*, in the absence of evidence as to what proportion of sales was made to automobile manufacturers and what for uses other than for automobiles, taxable under the statutes covering automobile parts or accessories.

The Reporter's statement of the case:

Mr. George M. Wilmeth for the plaintiff.

Messrs. Ralph C. Williamson and *Arthur J. Iles*, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The Bassick Manufacturing Company, Inc., during the times hereinafter mentioned was, and now is, a corporation organized, existing, and operating under and by virtue of the laws of the State of Delaware, with its principal place of business located at Chicago, Illinois.

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[1] Certiorari granted.

II. During the times hereinafter mentioned plaintiff was engaged in the business of manufacturing and selling gascolators (gasoline strainers).

A gascolator is a device designed to be placed between the fuel tank and the carburetor of any internal combustion motor for the purpose of taking out dirt, water, grit, or any foreign matter from the gasoline before it gets to the carburetor, preventing the carburetor from becoming inoperative or not functioning properly. Gascolators were sold by plaintiff to and used, during the period October 31, 1922, to March 31, 1926, by airplane, farm implement, automobile, and industrial machinery manufacturers. Said gascolators were adaptable for use on internal combustion engines, which are used to drive tractors, airplanes, industrial machinery, motor boats, marine boats, and automobiles, and were interchangeable on any combustion engine dependent on the size of the fuel pipe, and the adapter, which is a device to connect the fuel pipe to the gascolator.

III. During the period October 31, 1922, to March 31, 1926, said gascolators were also sold to companies that only manufactured farm implements and industrial machinery.

The difference in the gascolators sold by plaintiff was in the size of the adapter, which connects the gascolator to the fuel pipe. The gascolator could be attached to the fuel pipe without the adapter by swedging the fuel pipe to the gascolator. Plaintiff issued in November, 1926, a catalogue wherein said gascolator and its various parts are described. Said catalogue advertises a "Ford gascolator," a "Franklin gascolator," and a special "Buick gascolator," and quotes prices therefor. It does not appear from the evidence what, if any, part of the taxes sought to be recovered herein were paid for gascolators sold to automobile manufacturers, or for uses other than for automobiles.

IV. Plaintiff made and filed its manufacturer's excise-tax returns monthly for the period September, 1922, to February, 1926, inclusive, showing the amount of tax due thereon which was duly assessed on such returns by the Commissioner of Internal Revenue, paid by plaintiff, for the months,

Memorandum by the Court

in the amounts, and on the dates hereinafter set forth as follows:

Period	Year	Month	Year	Page	Line	Amount	Date paid
September		October		105	4	$5,433.36	Oct. 28, 1922
October	1922	December	1922	2	1	4,132.48	Dec. 1, 1922
November		December		128	0	3,641.64	Dec. 27, 1922
December		January		119	7	2,055.83	Jan. 27, 1923
January		February		112	2	3,231.64	Feb. 26, 1923
February		March		103	7	7,879.78	Mar. 27, 1923
March		April		108	8	7,844.07	Apr. 26, 1923
April		June		0	7	3,417.35	June 1, 1923
May		June	1923	111	2	3,982.35	June 29, 1923
June		August		0	8	1,138.96	Aug. 1, 1923
July	1923	August		108	3	860.59	Aug. 29, 1923
August		September		96	1	1,406.83	Sept. 27, 1923
September		October		117	8	2,232.31	Oct. 30, 1923
October		November		110	8	1,955.98	Nov. 28, 1923
November		December		112	4	1,026.29	Dec. 28, 1923
December		January		122	2	1,047.07	Jan. 29, 1924
January		February		139	0	781.70	Feb. 29, 1924
February		April		11	8	763.93	Mar. 31, 1924
March		April		158	6	1,096.17	Apr. 29, 1924
April		May		120	6	1,582.19	May 27, 1924
May		July	1924	1	5	1,620.80	July 1, 1924
June	1924	July		127	6	1,083.88	July 31, 1924
July		September		22	7	227.26	Sept. 6, 1924
August		September		52	4	656.41	Sept. 26, 1924
September		October		55	3	426.70	Oct. 30, 1924
October		December		11	3	381.27	Dec. 5, 1924
November		December		40	3	197.62	Dec. 24, 1924
December		January		58	9	164.38	Jan. 31, 1925
January		March		1	8	151.09	Mar. 3, 1925
February		March		50	2	417.03	Mar. 31, 1925
March		April		46	6	707.04	Apr. 28, 1925
April		May		43	6	499.69	May 29, 1925
May		June	1925	51	2	928.77	June 30, 1925
June	1925	July		48	1	1,005.80	July 29, 1925
July		September		1	3	807.82	Sept. 1, 1925
August		October		0	7	739.09	Oct. 1, 1925
September		October		49	0	589.75	Oct. 31, 1925
October		December		2	6	531.81	Dec. 1, 1925
November		December		52	6	476.29	Dec. 31, 1925
December		January		39	9	1,031.15	Jan. 29, 1926
January	1926	March	1926	5	6	273.23	Mar. 2, 1926
February		April		0	3	571.05	Apr. 1, 1926

V. On September 29, 1926, plaintiff filed its claim for refund #355680 of manufacturer's excise tax so paid on gascolators (gasoline strainers) for the period September, 1922, to February, 1926, inclusive, in the amount of $15,616.01, which was duly rejected by the Commissioner of Internal Revenue on April 12, 1927.

The court decided that plaintiff was not entitled to recover.

MEMORANDUM BY THE COURT

This case is controlled by the decisions of this court in *Walker Manufacturing Co.* v. *United States*, 65 C. Cls. 394; *Cole Storage Battery Co.* v. *United States*, 65 C. Cls. 164;

Advance Automobile Accessories Corp. v. *United States*, No. H–3, decided October 22, 1928 [66 C. Cls. 304]; *Borg & Beck Co.* v. *United States*, No. H–437, decided March 11, 1929 [67 C. Cls. 242]; *Edison Storage Battery Co.* v. *United States*, No. F–359, decided May 6, 1929 [67 C. Cls. 543].

Plaintiff's petition should be dismissed. It is so ordered.

CHARLES F. BOND, AS RECEIVER OF THE PARTNERSHIP OF THORP & BOND, v. THE UNITED STATES

[No. 17635–Congressional. Decided June 10, 1929]

On the Proofs

Congressional reference; statute of limitations; jurisdiction; Crawford Amendment.—The Court of Claims, under the Crawford Amendment, sec. 5, act of March 4, 1915, has no jurisdiction of a claim referred to it by one of the Houses of Congress under section 151 of the Judicial Code, where the said claim is one for which suit could have been brought and which, at the time of the reference, is barred by the statute of limitations.

The Reporter's statement of the case.

Mr. William D. Harris for the plaintiff. *Messrs. Clarence W. De Knight* and *Frank Davis, jr.*, were on the brief.

Mr. Percy M. Cox, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The case was dismissed with the following:

MEMORANDUM BY THE COURT

This case reaches the court through a congressional reference under section 151 of the Judicial Code. The reference is of a Senate bill, which bill reads as follows:

"A BILL For the relief of Charles F. Bond, receiver of the partnership of Thorp and Bond, on a contract for construction work

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Secretary of the Treasury be, and he is hereby, author-

Memorandum by the Court

ized and directed to pay to Charles F. Bond, receiver of the copartnership property, assets, and effects of the late firm of Thorp and Bond, of New York, out of any money in the Treasury not otherwise appropriated, the sum of $50,000, for labor and material furnished and damages sustained by the said firm because of the acts of the United States in connection with the construction of the post-office building at Washington, District of Columbia."

The same case on precisely the same record was before the court under a similar reference in 1904. On March 4, 1915, before any findings of fact were made, the 1904 case was dismissed for want of jurisdiction, the court at the time entering the following order:

"This case having been submitted on a former day of this term and being yet undetermined, and it appearing that the claim therein mentioned was one for which suit could have been brought in this court and is now barred by the statute of limitations, the jurisdiction of the court to investigate and report the facts has been withdrawn by section 5 of the act of March 4, 1915 (omnibus claims bill), the only function remaining to the court is that of announcing the fact and dismissing the cause. (*Ex parte McCardle*, 7 Wall. 506, 514.) The said fact is hereby announced and said case dismissed. (*Chase et al.*, decided May 10, 1915, 50 C. Cls. 293.) (Pet. 15.)"

The case was then allowed to rest until 1927, when the above Senate bill was referred. The plaintiff now insists that the case is one for the payment of a gratuity, is neither legal nor equitable, and that the payment of the amount claimed rests in the discretion of Congress. We think the position taken is untenable. The Crawford Amendment (38 Stat. 996) is as follows:

"SEC. 5. That from and after the passage and approval of this Act the jurisdiction of the Court of Claims shall not extend to or include any claim against the United States based upon or growing out of the destruction of any property or damage done to any property by the military or naval forces of the United States during the war for the suppression of the rebellion; nor to any claim for stores and supplies taken by or furnished to or for the use of the military or naval forces of the United States, nor to any claim for the value of any use and occupation of any real estate by the military or naval forces of the United States during said

Syllabus

war; nor shall said Court of Claims have jurisdiction of any claim which is now barred by the provisions of any law of the United States."

The case involves a contract to construct the post office in Washington. Whatever findings we might make depends upon the record adduced, upon the stipulations and the construction of the contract between the parties; and the amount of damages suffered is obviously inseparable from contractual relations. The acts of the United States upon which the plaintiff relies were manifestly those which, if sustained by proof, would amount to a breach of the contract. It is difficult to read the bill and arrive at any other conclusion than a distinct purpose to elicit facts growing out of a contract which was not observed in all its details. Congress was by the act transferring from its committee to this court the adjudication of contractual rights. Under these circumstances we can do no more than adhere to our former opinion and dismiss the petition. It is so ordered.

A. G. NEWCOMB AND P. A. CONNOLLY, RECEIVERS OF THE McMYLER INTERSTATE CO., v. THE UNITED STATES

[No. E-441. Decided June 10, 1929]

On the Proofs

Contracts; delays; application for extension of time; failure to follow agreed method.—Where a Government contract provides the method by which a contractor may apply for extension of time, that failure to follow the same shall be considered a waiver of extension, and that the contractor agrees to accept the finding of the Government in the premises as conclusive and binding, and the contractor does not follow the method prescribed, deduction of liquidated damages for delay covered by the terms of the contract is conclusive.

Same; improvident contract; loss.—The making of an improvident contract does not of itself entitle the contractor to relief from loss suffered in performance.

The Reporter's statement of the case:

Messrs. James W. Good, W. W. Ross, Everett Sanders, and *L. A. Gravelle* for the plaintiff.

Mr. George Dyson, with whom was *Mr. Assistant Attorney General Herman J. Galloway,* for the defendant.

The court made special findings of fact, as follows:

I. The McMyler Interstate Company, the original plaintiff, was a corporation organized and existing under the laws of the State of Ohio, having its principal office and place of business at Bedford in that State. On June 2, 1928, A. G. Newcomb and P. A. Connolly, receivers of said company, were substituted as plaintiffs by order of court.

On December 31, 1919, the plaintiffs' company and defendant entered into a written contract whereby for a consideration of $138,875.00 the former agreed to furnish, deliver, and erect upon foundations furnished by the defendant, three electric traveling hammer-head cranes, two for the navy yard at Norfolk and the third for the navy yard, Philadelphia. A copy of said contract, specifications, and general provisions was attached to the petition as Exhibit A and is made a part hereof by reference. Delivery of one of the Norfolk cranes and the Philadelphia crane was to be made within 200 days and the other Norfolk crane within 205 days from the date that a copy of the contract was delivered to the company. A copy of said contract was sent to the company under date of January 15, 1920, and received by it on January 17th.

II. During the first three months of 1920 considerable railroad-car shortage was experienced and about April 10th a switchman's strike began. This strike made transportation conditions particularly severe during April and May, and these abnormal conditions continued, slightly modified, until autumn. Plaintiffs' company had contracted for materials to be delivered f. o. b. place of manufacture, but as a result of the strike the railroads placed embargoes on shipments and the company was delayed in getting shipment of its materials to its plant. This delay resulted in its not being able to complete the installation of the cranes

according to the time limit of the contract, the crane for Philadelphia being completed February 7, 1921, and two cranes at Norfolk on March 12, 1921.

III. The plaintiffs' company by letter of July 31, 1920, advised the navy yard, public-works department, at Philadelphia and Norfolk, that the railroad situation was delaying the delivery of the cranes; that under the circumstances it could not tell when delivery could be made, and asked for an extension of time on the contract. On September 13, 1920, the public-works officer at Norfolk addressed a letter to the company suggesting that a formal request for extension of time be prepared and forwarded, and again, on January 8, 1921, the public-works officer at Norfolk suggested that the company submit to him a claim for such extension of time as to which it felt itself entitled.

On February 1, 1921, the company prepared and forwarded requests to the public-works officer at both yards, asking for an extension of time to February 7, 1921, at Philadelphia, and February 21, 1921, at Norfolk. The company supplemented its request to the public-works officer at Norfolk by a letter to him of March 15, 1921, enclosing letters from various railroads indicating the transportation difficulties of the period involved.

IV. On February 16, 1921, the public-works officer at Philadelphia, in a letter to his commandant, recommended that an extension of time be granted the company until the date of completion, to wit, February 7, 1921. This was forwarded with approval recommended to the Bureau of Yards and Docks by the commandant on February 18. Likewise on March 29, 1921, the public-works officer at Norfolk made a recommendation to the Bureau of Yards and Docks that final settlement be authorized without assessment of liquidated damages. The recommendations of the two public-works officers to the bureau were forwarded by the bureau to the Secretary of the Navy under date of August 11, 1921, with request for decision as to whether settlement without penalty for delay was authorized.

The Secretary of the Navy forwarded this request to the solicitor for an opinion. This opinion "recommended that

the Bureau of Yards and Docks be instructed to waive all liquidated damages heretofore imposed for delays due to transportation after delivery of material on the cars at the mill." Under date of September 9, 1921, the Secretary of the Navy forwarded an approval of this opinion to the Bureau of Yards and Docks. The Bureau of Yards and Docks on September 19, 1921, wrote the Secretary of the Navy as follows:

Reference: (a) Bureau Y&D letter 4092, 8/11/21. (b) J. A. General's indt. 26801–1351, 9/10/21, approved by Secretary of the Navy.

Inclosures: (A) Reference (a) with inclosures and indorsements.

1. In accordance with the instructions in reference (b), due allowance will be made, in computing liquidated damages, for delay ascertained to have been due to transportation after delivery to the contractor of material on the cars at the mills.

2. The bureau has construed paragraph 14 of the general provisions as authorizing time extensions for delays owing to strikes, whether the strikes occur at the site of the work or elsewhere, and whether the delay caused by them is in the delivery of material or in the prosecution of construction work at the site. In the present case all the delay is attributed by the contractor to the outlaw railroad strike and conditions resulting therefrom. Much of this delay occurred before the delivery of material on cars at the mills.

3. Further instructions are therefore requested as to whether, on the facts presented in reference (a) and its inclosures, the closing of the contract without the assessment of liquidated damages is authorized.

C. M. PARKS.

After reference to the Judge Advocate General the following opinion was given to the Secretary of the Navy on June 2, 1922:

Reference: (a) Opinion of Solicitor under Y. & D. Contract #2650, The Austin Company, for radio towers at Annapolis, June 25, 1921: approved by the Assistant Secretary. (b) Decision of the Comptroller General (Appeal No. 37304, May 5, 1922, under Yards and Docks Contract #2650).

1. The 1st indorsement is the opinion of the Judge Advocate General based upon reference (a). It related to the extension of time which the contract provides may be granted for unavoidable delays and also provides that delays

caused by the delivery of material shall not be considered unavoidable. In reference (a) the solicitor held that the contractor took delivery at Hamilton, Ontario, and held the delay caused by slow railroad transportation after that delivery was not a delay in the delivery of material mentioned above.

2. In reference (b) the Comptroller General has considered other phases of the same contract to which reference (a) applied and in sending the case back to the Navy Department division used the following language:

"It is to be noticed that there is a question with respect to the extensions which were granted on account of delays in completing the towers. At this time, however, they will not be considered beyond stating that the present record in the case does not indicate a compliance with paragraph 12 of the General Provisions of the contract which provided that the failure or neglect of the contractor to submit claims for extension of time within 30 days after the happening of the cause or causes upon which its claim is predicated shall be deemed and construed as a waiver of all claim and right to extensions. Furthermore, delays in securing delivery of materials (not at the plant of the Hamilton Bridge Works) at the site of the towers are not unavoidable delays within the intent and meaning of paragraph 14 of the General Provisions, and extensions allowed for such delays apparently would not be in accord with the contract."

3. It appearing, therefore, to be the opinion of the Comptroller General that delivery of material means delivery at the site, the first indorsement would probably be not approved by the General Accounting Office.

4. The case is now returned for a decision as to delays caused by strikes and especially what was known as the outlaw railroad strike and the conditions resulting therefrom. It has been claimed by the bureau that the exempting of delivery of material from the causes for which extension may be given is modified by the provision with regard to strikes, in paragraph 14 of the General Provisions which make extension allowable for "strikes of such scope and character as to interfere materially with the progress of the work." The delay considered under reference (a) was due to railroad embargoes, and it is possible that a distinction may be drawn under this contract between such delays and delays in transportation due to strikes. In view, however, of the doubt which arises because of reference (b) it is recommended that this case be sent to the General Accounting Office for final settlement and the contractor so advised.

J. L. LATIMER.

Opinion of the Court

to which was added the Secretary's indorsement as follows:

From: Secretary of the Navy.
To: Bureau of Yards and Docks.
Subject: Contract No. 4092 (Dept. No. 2774), December 31, 1919, of the McMyler Interstate Company for three electric hammer-head cranes for fitting-out piers, two for Norfolk Navy Yard and one for Philadelphia Navy Yard.—Delay in completion.

1. Forwarded, approved.
2. The Bureau is directed to forward all papers necessary for submission to General Accounting Office, to the Judge Advocate General.

CHAS. B. MCVAY, Jr.

The papers were on June 19, 1922, forwarded to the General Accounting Office for final settlement. On June 19, 1925, the Comptroller General refused to allow the company's claim.

V. The amount to become due under the contract, together with certain changes authorized, was $142,775.00. Of this amount the defendant has paid to the company $101,037.30, leaving the disputed balance $41,737.70.

There was assessed against the plaintiff as liquidated damages for 613 days' delay at $60 a day the sum of $36,780, leaving a balance due the plaintiffs of $4,957.70.

The court decided that plaintiffs were entitled to recover $4,957.70.

GRAHAM, *Judge*, delivered the opinion of the court:

This is a suit brought by the McMyler Interstate Company to recover a sum deducted as liquidated damages from a sum which would otherwise be due the company under a written contract. Since the commencement of this suit A. G. Newcomb and P. A. Connolly, receivers for the said company, have been substituted as plaintiffs by order of the court.

On December 31, 1919, the McMyler Interstate Company entered into a formal written contract with the defendant to furnish, deliver, and erect upon foundations to be furnished by the defendant, three electric traveling hammer-head cranes, two for the navy yard at Norfolk and the third for the navy yard at Philadelphia, for the sum of $138,875.

A copy of the contract was sent to the plaintiffs' company on January 15th, 1920, and received by it on January 17th. Taking the latter date the cranes should have been delivered, as provided in the contract, at Norfolk on August 4th and at Philadelphia on August 9, 1920. Under the contract one Norfolk crane and one Philadelphia crane were to be delivered and erected within 200 days and the other Norfolk crane within 205 days. There was a delay of 184 days on the Philadelphia crane and 212 and 217 days, respectively, on the Norfolk cranes, making a total delay of 613 days.

The contract provided for the assessment of liquidated damages at $60 per day, and the defendant assessed plaintiffs' company with damages for 613 days at this rate.

The contract contains provisions for an extension of time and the conditions under which the extension could be secured. It is a formal written contract, the language of the contract is unambiguous, and the court has no option but to enforce it as it finds it. Section 12 of the contract provides as follows:

"*Extension of time.*—For causes of the character hereinafter enumerated extensions of time for the completion of the work may be allowed. Should the contractor at any time consider that he is entitled to an extension of time for any cause, he must submit in writing to the officer in charge an application for such extension, stating therein the cause or causes of the alleged delay. The officer in charge will refer the same at once, with full report and recommendation to the Navy Department, Bureau of Yards and Docks, for consideration and for such action as the circumstances may warrant. The failure or neglect of the contractor to submit, as above provided, his claim for extension of time within 30 days after the happening of the cause or causes upon which his claim is predicated shall be deemed and construed as a waiver of all claims and right to an extension of time for the completion of the work on account of the alleged delay, and the contractor agrees to accept the finding and action of the Navy Department, Bureau of Yards and Docks, in the premises as conclusive and binding."

The contractor did not submit an application for extension of time within thirty days after the happening of the cause or causes upon which the claim was based, and under the terms of this contract it is debarred from objecting to

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the assessment of liquidated damages. See *Pawling & Co.* v. *United States*, 60 C. Cls. 699, 710, 273 U. S. 665. It should have submitted its claim for an extension of time. Having failed to do so within thirty days as provided in its contract, its claim when submitted came too late. The Government was not called upon to allow it, and did not allow it, and the contractor therefore must fall back upon some other ground for excusing the delays. These are delays in shipments and in securing material. The contract distinctly covers and excludes such grounds as excuses for delaying. It contains the following provision:

"*Unavoidable delays.*—Unavoidable delays are such as result from causes which are beyond the control of the contractor, such as acts of Providence, fortuitous events, inevitable accidents, abnormal conditions of weather or tides, or strikes of such scope and character as to interfere materially with the progress of the work. Delays caused by acts of the Government will be regarded as unavoidable delays. Delays in securing delivery of materials, or by rejection of materials on inspection, or by changes in market conditions, or by necessary time taken in submitting, checking, and correcting drawings or inspecting material, or by similar causes, will not be regarded as unavoidable. Should any delay in the progress of the work seem likely to occur at any time, the contractor shall notify the officer in charge in writing of the anticipated or actual delay, in order that a suitable record of the same may be made."

The contractor may have made an improvident contract, but that is not to be considered by the court. It can not complain if under the terms of the contract it has suffered a loss. *Howard Bros.* v. *United States*, 60 C. Cls. 583, 588; *Converse et al.* v. *United States*, 61 C. Cls. 672, 682 (certiorari denied); *Wells Brothers Co.* v. *United States*, 254 U. S. 83, 86; *Wood et al.* v. *United States*, 258 U. S. 120; and *Crook Co.* v. *United States*, 59 C. Cls. 593, 270 U. S. 4.

Judgment will be entered for the plaintiffs, and it is so ordered.

SINNOTT, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

MOSS, *Judge*, took no part in the decision of this case, on account of illness.

JAMES STANTON AND EDWARD JONES, TRADING AS STANTON & JONES, v. THE UNITED STATES

[No. H-215. Decided October 21, 1929]

On the Proofs

Special jurisdiction; relief act of February 12, 1927; contract for revetment work.—The relief act of February 12, 1927, provides a judicial forum where the contractual rights of those for whom it was enacted may be determined, and does not concede liability on the part of the Government.

Same; ascertainment of facts; sec. 151, Judicial Code.—Where the intention of Congress is simply to ascertain the facts in a case, in connection with a bill providing for the payment of a claim against the United States, the reference of the bill to the Court of Claims for that purpose is done under section 151 of the Judicial Code.

Same; extent of special jurisdiction.—A special act authorizing suit against the United States and conferring jurisdiction upon the Court of Claims to enter judgment for damages found to have been suffered, is not a mere direction to assess the amount of damages, but requires the cause of action itself to be adjudicated and determined.

The Reporter's statement of the case:

Mr. M. Walton Hendry for the plaintiffs.

Mr. P. M. Cox, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiffs, James Stanton and Edward Jones, now are and were during the period hereinafter mentioned citizens of the United States, residing in Leavenworth, Kansas, and were at the time of the transactions involved in this suit doing business as a partnership in the firm name of Stanton & Jones, having their principal place of business at Leavenworth, Kansas.

II. The action is brought pursuant to the act of Congress approved February 12, 1927, entitled "Private—No. 348—69th Congress, H. R. 9919, An act for the relief of Stanton and Jones," as follows:

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"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That Stanton and Jones are hereby authorized to bring suit against the United States under contract with the engineer's office, dated June 12, 1918, for revetment work, Pelican Bend, Missouri River, to recover whatever damages or losses which they may have suffered through action by governmental agencies in commandeering, purchasing, moving, or causing to be moved from the Missouri River the fleet of the Kansas City Missouri River Navigation Company, or of any other action of governmental agencies which resulted in any loss to the claimants. Jurisdiction is hereby conferred upon the Court of Claims of the United States to hear, consider, and determine such action and to enter decree or judgment against the United States for the amount of any loss or damages as may be found to have been suffered by the said Stanton and Jones under the said contract, if any: *Provided*, That such action shall be brought and commenced within four months from the date that this act becomes effective.

"Approved, February 12, 1927."

III. Under date of June 12, 1918, the plaintiffs entered into a contract with the Engineer Corps, U. S. A., acting on behalf of the United States, for the construction of certain revetment work at Pelican Bend, Missouri River, upon a bid made and accepted, all in compliance with the terms of an advertisement of the Engineers Corps, published in connection therewith. A copy of the advertisement for bids and the contract is marked "Plaintiffs' Exhibit 1" and by reference made a part of this finding.

IV. The specifications, incorporated into the contract, contained the usual provisions for standard revetment work with concrete block protection to the water line, and recited, among other things, that the bidders were to examine the Government's map and drawing, visit the locality of the work, and "to make their own estimates of the facilities and difficulties attending the execution of the proposed contract, including local conditions, uncertainty of weather, and all other contingencies."

V. The plaintiff, Edward Jones, had been an assistant engineer in the civil service in the Engineer Corps of the Army for several years, and had performed services in connection with similar work. He had previously undertaken and com-

pleted two contracts for revetment work of about the same size as the one in question, and was therefore, familiar with the contingencies to be met with in river work and was forewarned of the necessity of a careful and exact understanding of the contract requirements.

VI. The work covered by the specifications consisted of about 11,750 linear feet of revetment in two sections. Operations, it was specified, were to begin 10 days after notification of the acceptance of the bid, or such later date as was allowed by the Government's representative, and should be completed within 12 working months, not including the months of December, January, and February, during which period no work would be required on account of winter conditions and possible ice, but would be permitted if, in the opinion of the Government's representative, work could be carried on without detriment to the undertaking as a whole.

The period of time for completion of the operation, it was estimated in the specifications, was considered sufficient for a contractor having the necessary plant, capital, and experience, except unforeseeable conditions arose.

In the event the operation did not progress at a rate to permit of completion within the time limit, the Government's inspector was authorized, after notice in writing, to employ additional plant and labor and purchase additional material to effect the proper stage of advancement of the work. Minor changes were required to be made without extra charge, and the contractor, or a responsible agent, it was provided, must be present at all times on the work and that damages to the plant would be a liability of the contractor.

VII. The specifications also noted that the following approximate quantities of material and labor would be required for the completion of the contract, namely, 1,070 anchor piles, of approximately 19,260 linear feet; 7,000 cords of willow brush; 550 cords of cribbing poles; the placing of 46,400 two-foot square concrete blocks; the placing of 8,100 cubic yards of ballast stone; 140,000 cubic yards of earth grading; the placing of 16,000 cubic yards of paving stone; and 4,500 cubic yards of spalls.

These quantities, it was noted, were for use only as a basis for the canvassing of bids, and in this connection it was provided that—

"The proposal form has an entry for each item on which estimates will be given or payments made, and no other allowance of any kind will be made unless specifically provided for in the specifications or the contract or supplemental contracts.

"The quantities of each item of the proposal as finally ascertained at the close of the contract in the units given, and the unit prices of the several items stated by the bidder in the accepted bid, will determine the total payments to accrue under the contract. The unit price bid for each item must allow for all collateral or indirect cost connected with it."

Further provision relative to compensation was to the following effect:

"The price bid for anchor piles shall include all labor, plant, and material used in driving and sawing off piles. The price bid for willow brush and cribbing poles shall include all labor, plant, and material used in preparing the site and building the mattress. The price bid for spalls shall include all labor, plant, and material used in placing the spalls as specified both for mattress and paving. The price bid for placing concrete blocks on the mattress shall include all transportation, delivery, labor, plant, and material used in handling and fastening the blocks in place. * * * The price bid for ballast stone shall include all labor, plant, and material used in sinking the mattress; the price bid for paving stone shall include all labor, plant, and material used in paving the bank, and where revetment connects with old work it shall include the removing of old paving and preparing the slope for new paving."

Concrete blocks of a specific size and design, of approximately 200 pounds weight, were furnished by the Government and "were to be loaded by the Government on the contractor's barges at Gasconade, Missouri, 95 miles upstream from the site of the work."

The unit of measurement for mattress weaving and laying and for paving work was provided for in detail.

VIII. The weaving and laying of the mattress was not permitted at any time the river stage was in excess of 5 feet, and it was estimated that during the period from March 1 to December 1, approximately 100 days would not

be available for mattress laying. Provision was therefore made for the extension of time for the number of days at which the high-level stage exceeded 100 days.

The grading of the bank, in preparation for the revetment work, required that "all false points" be "washed or graded away to fair out the bank line to such extent as may be directed by the" Government inspector "and the bank left with a slope of 1 in 3"; the slope, it was specified, should be "a neat even surface," * * * "all holes made in the slope due to hydraulic grading or from rain or wave wash shall be filled to an even surface with the slope"; and the cost of the foregoing, it was noted, should "be included in the price bid for grading" * * * "if the contractor fails to pave properly immediately after the required grading is done, and, as a result of such failure or any other fault of the contractor, additional grading or filling over the first required and measured should become necessary to prepare the bank properly for the paving, such additional grading or filling will not be paid for."

Detailed provisions were incorporated relative to the weaving of the mattress.

IX. The plaintiffs submitted a bid in the form required and "in conformity with the advertisement and specifications," which were made a part of the contract, specifying the contract price for each of the items referred to.

X. At the time of the submission of the bid for the revetment contract, the plaintiffs did not possess adequate equipment for the full discharge of their contract obligations.

The plaintiffs appear to have had available 5 barges for use in the transportation of rock and willow brush, and in addition a barge with an hydraulic hoisting apparatus, a barge with an hydraulic grader, etc., a gasoline power motor boat of 4 tons, a gasoline power towboat of 11 tons, as well as horses, mules, wagons, harness, etc.

Some effort had been made to complete an arrangement with the Kansas City Missouri River Navigation Company for the transportation of the concrete blocks from Gasconade to Pelican Bend, and a quotation of 7¢ per block had been secured from the navigation company.

Under date of July 30th the plaintiffs were advised by the navigation company that it would be unable to perform this service, by reason of the fact that negotiations were then under way with the United States Railroad Administration for the sale of its fleet and its transfer to the Mississippi River. Thereafter, the plaintiffs endeavored to procure other means of transportation, and under date of September 12, 1918, they purchased the following additional equipment at a cost of $14,000: 1 steam tug, the *J. R. Wells*, wood hull, stern wheel, 110.6 length, 20.6 beam; 1 floating pile driver, 19′ x 77′ x 4′ 4″, fully equipped; 1 quarter boat and sleeping equipment; 9 barges, approximately 20′ x 80′.

Extensive repairs were made at a cost of $12,000. As a result of the foregoing, active operations were not begun until the end of October, 1918.

XI. The steam tug was used primarily for the towing of barges to and from Gasconade, and was otherwise employed in the shifting of the barges as the revetment work progressed. The gasoline towboat was used, in the absence of the steam tug, in the necessary shifting of barges.

XII. The necessary rock and spalls for use in the revetment work were provided for by a contract dated August 17, 1918, providing for the commencement of delivery to the plaintiffs, on or about September 1, 1918, on Muskit Ferry, 3 miles distant from Pelican Bend on the opposite bank of the river.

XIII. The date of plaintiffs' bid was June 12, 1918. It was accepted July 11, 1918, and the plaintiffs notified of such fact on July 17, 1918. The plaintiffs acknowledged receipt on July 18, 1918. The date thus automatically fixed by the terms of the contract for commencement of the work was July 28, 1918, and completion, with the exceptions above noted, was required on or before October 18, 1919.

XIV. Work was begun by the contractor on October 14, 1918, but due to high water during the working period of 1919, in excess of 100 days, an extension was granted for the requisite number of working days, namely, to November 26, 1919.

XV. The initial operation consisted in preparing the edge of an existing revetment in the bank so as to dovetail the junction thereof with the new revetment work.

A daily record of the detailed progress of the work was made by the Government inspector and a report made to Government district engineer, with a summary of the progress made for each 10-day and monthly period of work, as set forth in defendant's Exhibit 11, which by reference is made a part of this finding.

On October 31, 1918, mattress weaving was begun, and by the end of November approximately 450 feet of mattress had been woven, 360 feet had been ballasted, but no concrete blocks had been placed in the upper or inshore edge of the mattress.

By the end of December, 1918, approximately 7 per cent of the operation had been completed, a rate of progress which would have required 21 working months.

Following the completion of repairs upon the steam tug and the barges secured for transportation of concrete blocks, two trips were made to Gasconade before the termination of the winter season, and 4,500 concrete blocks were secured; 3,800 were used upon the mattress already laid and in paving operations. Thereafter, and until August 16, 1919, the plaintiffs were supplied with and transported to Pelican Bend 25,876 concrete blocks, all of which were loaded upon the plaintiff's barges at Gasconade, in such installments as the supply and condition of the plaintiffs' barges permitted.

At all times during the foregoing period, the plaintiffs had available at Pelican Bend an excess of concrete blocks over those possible of use in connection with the mattress-weaving operations.

XVI. During the working season of 1919, beginning on March 17th and continuing until July 20th, the river rose above the permitted working stage, and all work was suspended for 15 days of March, 4 days of April, and 30 days of May. However, much work was done in grading and paving the bank and in assembling material during the month of April.

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On June 2d, in spite of the high-water stage of the river, work in all departments, including mattress weaving and laying, was begun and continued until December 11th, with the exception of Sundays and approximately 7 days of rain.

Due, however, to the delay otherwise experienced, either by labor shortage or the necessity of repair of the fleet, the plaintiffs realized in September that the contract could not be completed within the contract time.

On September 27, 1919, they requested an extension of time under the contract of 150 working days, citing as the principal reasons for the delay, (1) the removal of the Kansas City Missouri River Navigation Company's fleet from the Missouri River and the consequent delay in securing other equipment for the transportation of concrete blocks, (2) the continued high water in the Missouri River during the preceding summer and spring, and (3) the unsettled labor conditions.

The plaintiffs were advised in reply that—

"Under the proviso of paragraph 15 of the specifications for additional time equivalent to the time the river is above the 5-foot working stage, the records of the office show that the time for completion of the contract is automatically extended 23 days, or to November 10, 1919, without penalty of payment of inspection charges."

XVII. Under date of May 26, 1919, the plaintiffs requested an advance payment of approximately $20,000, due to an unbalanced financial status of their accounts, and noted that they had expended approximately $56,100 in the accumulation of material then held at Pelican Bend, and that due to the continued high water which was likely to be protracted, they had not figured "on so large an investment in unused material for an indefinite period without return."

The request was rejected due to the absence of authority in the Government officials and the limitation which permitted and required payment to be made, under such contracts, each month for the completed work and in accord with the bid prices.

XVIII. At the close of the working season of 1919, the plaintiffs had completed the grading of 5,600 feet of bank and had paved 4,000 feet of the same; mattress weaving

approximated 4,985 feet, and 4,729 feet thereof had been ballasted.

XIX. Under date of January 27, 1920, it was authoritatively represented to the plaintiffs that if it met with their approval, the Government would be willing "to enter into a supplemental agreement with you to cancel the contract for all the work on the upper section which will greatly reduce the total amount of work covered by your contract."

XX. Under date of March 9, 1920, an amending agreement was entered into securing to the Government the right to increase or decrease the length of the revetment work, but not in excess of 30 per cent of the original.

Under date of December 13, 1920, the plaintiffs, in reply, stated:

"Referring to our contract for the construction of 11,750 feet of revetment in Pelican and supplementary agreement dated March 9, 1920, we beg to state that we have completed the lower section of that work, and that owing to a bar formation several hundred feet in width throughout the entire length of the upper section ranging in height from standard low water to 8 feet above, we find that we are unable to construct any part of the upper section in compliance with the plans for said work. We therefore ask that that portion of our contract be annulled, and that the money retained for the faithful performance of the contract be paid to us as a final completion of the contract."

Under date of January 18, 1921, a supplemental agreement was entered into reciting that whereas—

"The contractor has completed the lower of the two sections into which the work was divided in the original contract (approximately 6,000 feet) and now finds that a bar has formed several hundred feet wide in front of the remaining section, which makes it inadvisable at the present time to continue the further revetment of this bend until conditions have become more permanent." * * *

It was therefore agreed that—

"The said contract is hereby terminated without the performance of any further work. The retained percentages, less any proper deductions, will be paid to the contractor, in consideration of which the contractor releases the United States from the claim arising out of the termination of said contract, including anticipated profits."

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XXI. Thereafter, the plaintiffs' accounts were stated and payment duly made in the sum of $101,998.19.

In addition, the Government's representative agreed to take over "such material as remains on hand in the vicinity of the revetment," consisting of certain inventoried items, of the total agreed value of $19,106.20.

XXII. In connection with the foregoing the plaintiffs contended that, as a consequence of the acts of the officials of the Government, they have sustained a loss in the sum of $180,511.53. The details of the contended-for loss are set forth in plaintiffs' Exhibit 13, which by reference is made a part of this finding.

XXIII. The items referred to consist of expenditures made by the plaintiffs in the acquisition of the necessary equipment for transportation of concrete blocks, the assembling of other material at Pelican Bend and the cost of the incidental labor; it also includes interest on the money expended, and the anticipated profits, plus an estimated rental value of the equipment used. The statement of loss also includes the cost of regrading a portion of the bank, in compliance with an order of the Government inspector; a loss due to the inaccurate measurement of stone by the Government inspector; and a loss resulting from the refusal of the Government inspector to permit of the previously authorized use of spalls for paving, in lieu of paving stones; and also the value of 300 unused pilings.

XXIV. Under the terms of the contract the plaintiffs were required to supply the necessary equipment and labor for the completion of the revetment work and base their bid upon the cost of the same.

The regrading of the bank was required to "fair out" a certain portion of the previously graded bank, so as to remove erosions caused by the wash of high water during the winter of 1919, while the bank was unprotected.

The measurement of stone used by the plaintiffs was calculated by the Government inspector on the barges and in strict accord with the contract stipulations and approved methods of measurement.

The use of spalls to be cast from a barge, in lieu of paving stones to be individually placed, as required by the specifica-

tions, was authorized by the district engineer on April 12, 1919, upon request of the plaintiffs, to afford immediate protection from high water for a designated 985 feet of graded bank. The plaintiffs made no effort to protect the bank in the manner authorized until the following August, at which time the river level had fallen to the normal working stage. The permission for this use of spalls was then withdrawn.

The 300 pilings consisted of surplus material held by plaintiffs in the Illinois River and was not included in the surplus material purchased by the Government.

The court decided that plaintiffs were not entitled to recover.

BOOTH, *Chief Justice*, delivered the opinion of the court:

The court's jurisdiction to adjudicate this case is conferred by the terms of the following special act of Congress approved February 12, 1927, to wit:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That Stanton and Jones are hereby authorized to bring suit against the United States under contract with the engineer's office, dated June 12, 1918, for revetment work, Pelican Bend, Missouri River, to recover whatever damages or losses which they may have suffered through action by governmental agencies in commandeering, purchasing, moving, or causing to be moved from the Missouri River the fleet of the Kansas City Missouri River Navigation Company, or of any other action of governmental agencies which resulted in any loss to the claimants. Jurisdiction is hereby conferred upon the Court of Claims of the United States to hear, consider, and determine such action and to enter decree or judgment against the United States for the amount of any loss or damages as may be found to have been suffered by the said Stanton and Jones under the said contract, if any: *Provided*, That such action shall be brought and commenced within four months from the date this act becomes effective."

The plaintiffs repeat a contention oftentimes made, that the only issue in the case, made so by the special act, "is the amount of such damages and losses." In other words, the Government by the act concedes liability, and all that remains for the court to do is to assess the loss. With this contention we are disinclined to agree. Special jurisdictional

acts are not always clear. This one is not distinctly obscure. A suit is authorized under a contract, granting the right to recover damages suffered, if any, by reason of specified interferences with the contractor's performance of the same, or by the action of governmental agencies in forestalling completion of the contract work. Judgment, if any, is to be predicated upon loss or damages "under said contract, if any." What the act provides is a forum to which the plaintiffs may resort, with the right to have the cause of action adjudicated and determined. We fail to discover in the language of the act an acknowledgment of liability; on the contrary, taken as a whole, the statute indicates an intent to transfer a contention advanced in Congress from that forum to a judicial forum, where the plaintiffs' contractual rights may be adjudicated according to law. If Congress intended to simply ascertain the facts, the way was open under section 151 of the Judicial Code. On the contrary, both Houses of Congress, with the approval of the President, confer a jurisdiction which sets forth the subject matter to be adjudicated as well as the origin of the claim and the causes alleged to have resulted in loss and damage. *United States* v. *Mille Lac Indians*, 229 U. S. 498, 500.

The plaintiffs contracted to perform specified revetment work at Pelican Bend, in the Missouri River. The contract was dated June 12, 1918, and was to be completed in twelve working months, which eliminated the months of December, January, and February, if, in the opinion of the Government's representative in charge, work could not be continued during these periods. Work was commenced by the contractor on October 14, 1918, and through extensions granted should have been completed by November 26, 1919. The contract originally contemplated the construction of 11,750 feet of revetments to be placed in what was designated the upper and lower sections of the bend, and on March 9, 1920, an amending agreement was entered into, conferring the right upon the Government to increase or decrease the length of the work not in excess of 30 per cent of the original length. On December 13, 1920, the plaintiffs by letter requested the Government to annul the contract for the construction of the revetments designed for the upper section

of the bend, citing the apparent difficulties in the way of the proper completion of this portion of the work. On January 18, 1921, the Government officials acceded to the plaintiffs' request and a supplementary agreement was entered into whereby the plaintiffs were relieved from further performance of the contract, and settled with them on the basis of approximately 6,000 feet of completed work on the lower section, in consideration of which the plaintiffs released the United States from claims arising out of the contract, including anticipated profits. See Finding XX. The plaintiffs were thereafter paid the sum of $101,998.19 and the Government purchased material on hand to the extent of $19,106.20, Finding XXI.

The record discloses that when the plaintiffs submitted their bid for the work they were not adequately equipped to perform the same. The specifications warned the contractors to visit the site and ascertain the difficulties inherent in the work. Mr. Jones, one of the partners, was not only an experienced engineer but perfectly familiar from past experience with work of this character. He knew what was essential in the way of equipment to perform the contract and also what the firm possessed. Realizing the imperative necessity for additional facilities in the matter of transportation of materials, particularly concrete blocks, an effort was made to complete an arrangement with the Kansas City Missouri River Navigation Company to convey the same from Gasconade to Pelican Bend at 7 cents per block. The arrangement was never consummated, for on July 30, 1918, the aforementioned navigation company entered into negotiations with the United States Railroad Administration for the sale of its fleet and its transfer to the Mississippi River. The plaintiffs stress this so-called interference of the Government, and rely principally upon it for a large portion of the amount of damages claimed. Obviously such a claim is not sustainable under the law. The plaintiffs had made no contract with the navigation company to transport its blocks. The most that is claimed is an arrangement to perform the service for 7 cents per block, a sum claimed to be less than the actual cost. True, the plaintiffs may have submitted their bid upon the basis of this cost, but assuredly they may not

be heard to complain of an error of judgment in nowise attributable to the Government. But aside from this, the record discloses and the court finds that plaintiffs' losses were not attributable to the loss of the services of the navigation company's fleet. This contract was entered into during the war. Plaintiffs knew of existing conditions and should have anticipated impending difficulties, which, as a matter of fact, seems to have been done, for the record firmly establishes that the plaintiffs had available at the point of necessity more concrete blocks than they had use for, and that the taking of the fleet in nowise contributed toward delay or undue expense. So that, granting in all aspects the contention of the plaintiffs as to the jurisdictional act, the claim for loss due to the taking of the fleet is without merit. It is manifestly impossible to compute a loss upon the basis of what happened in comparison with what might have happened. The plaintiffs fail to establish a binding obligation with the navigation company to transport blocks at a given price, and afford the court no more than preliminary negotiations looking toward an uncompleted transaction.

In the specifications, which are by reference made a part of the findings, appears the following paragraph, viz:

"*Order of work.*—All work shall be carried on continuously from upper end. Prior to the high water season of 1918, work shall be started on one section only, which will be determined by the contracting officer. Thereafter, if required by the contracting officer, two working parties shall be employed at such places as may be directed."

The plaintiffs construe this paragraph as a mandatory provision exacting the commencement of the work on the upper section, and allege as a breach thereof that work was commenced upon the lower section, such work being more expensive, and completion retarded in virtue of this disadvantage. This paragraph makes specific provision for three distinct methods of procedure. First, work is to be continuously carried on from the *upper end*, not section, i. e., progress downstream; second, anticipating the high-water season of 1918, the work will be started on a single section to be determined by the contracting officer; and, lastly, work may be required of the contractor by the contracting

officer of two working parties at such places as he may direct. It is true the contractor misconceived the meaning of the paragraph and did incur a nominal expense in preparation for work on the *upper section;* but before any substantial progress had been made the work was transferred to the lower section. No work whatever was thereafter done on the upper section, the contractor at its own request being relieved therefrom.

The next item predicated upon the contract involves the sum of $206.23. The plaintiffs were by the contract and specifications bound to do certain grading (Finding VIII). The contention is advanced that the required grading was accomplished, inspected, and passed and that subsequently another inspector condemned the work and required some of it to be done over. The record, it is said, discloses that the work was in precisely the same condition when condemned as it was when passed by the first inspector. The specifications made it obligatory upon the part of the contractor to protect and maintain the integrity of the work done, and save it harmless from floods or other causes, and any injury resulting to work done was to be made good by the contractor. This is the obligation in this respect the contractor assumed, and unless the good faith of the defendant is successfully challenged, what was exacted of the contractor as to grading exposed to the winter months, in the way of repairing and completion, falls within the terms of the agreement. The specifications go into detail respecting the grading to be done, and expressly require that it shall be "neat" and "first class."

A loss is alleged to have been suffered by reason of incorrect measurements of stone. Paragraph 43 of the specifications provides as follows:

"43. *Measurement of materials.*—Anchor piles shall be 18 feet long, or, for special conditions, of such additional lengths as may be designated by the contracting officer. All measurements will be made to the nearest foot, which is the specified unit of payment for piles in place in the work.

"Brush and cribbing poles delivered on barges or otherwise shall be compactly and evenly corded; shall be laid straight, without criss-crossing or tangled tops. The cross-cording shall be in uniform layers two (2) to three (3) feet

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in thickness, separated by lengthwise layers one-half (½) to one (1) foot thick. Butts of the cross-cording shall be lined and corded up evenly. All measurements will be made to the nearest 1-tenth foot and the volume determined to the nearest whole cord, which is the specified unit of payment for brush and poles in place in the work. If any fraudulent cording or inferior material be discovered later, deductions for the same will be made, or the brush and poles may be repiled by the contractor under the supervision of the contracting officer and remeasured.

"Stone and spalls delivered on barges or otherwise shall be evenly corded up and leveled to facilitate measurement. No stone and spalls shall be mixed, but shall each be evenly corded up and leveled to facilitate a separate measurement. All measurements will be made to the nearest 1-tenth foot and the volume determined to the nearest whole cubic yard which is the specified unit of payment for stone and spalls in place in the work. If any fraudulent cording or inferior material be discovered later, deductions for same will be made, or the stone and spalls may be repiled by the contractor under the supervision of the contracting officer and remeasured."

The gravamen of the complaint as to this item revolves about a change in the method of measuring the stone inaugurated by the last inspector, a change which the plaintiffs designate as departing from the usual and customary method employed. The manifest error in the plaintiffs' contention is apparent, for the contract and specifications provided the method. Whether it was customary or not is immaterial. The method employed by the final inspector is not shown to have been a departure from the contract provisions. The specifications provide for a system of cording up the stone in such a manner as to expedite measurements and fix as near as may be the exact cubic contents of the mass. To place stakes of a given height upon the barges and requiring the stone to be loaded to their level can not be said, in view of the record, to have been so glaringly erroneous as to fail to reflect within reason the cubic contents of the inclosed mass. In addition to failure to establish a departure from the contract in this respect, article 2 of the contract made the decision of the contracting officer final as to quantity and quality of materials furnished.

The item designated in plaintiffs' brief as number 11 is for a loss ascribed to a breach by the defendant of a special

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written agreement covering the placing of spalls during a time of flood water. The contractor solicited the privilege of placing spalls upon a specified area of mattresses during a time when the water in the river exceeded a five-foot stage, direct from barges, and stated that if allowed the privilege a reduction in the price of such work would be made. The defendant acceded to the request in April, 1920, but the plaintiffs did not avail themselves of the change, and made no complaint until the following August, and then at a time when the stage of the river was within workable heights. The inspector in August refused permission to place the spalls from the barges awaiting a decision of the engineer officer in charge. The letter was annulled. The agreement to place the spalls from barges was not without limitations. It was favorable to the plaintiffs and designed to protect their work in flood stages of the river. The record shows that the plaintiffs failed to take advantage of it until the conditions under which they might so do had passed. The burden of proof is with the plaintiffs, and the record establishes a failure to prove a disallowance to proceed under the special agreement of April, 1920, of such an extent as to cause a loss.

The remaining items in suit will not be discussed. They pertain to interest, loss of profits, and losses incident to the taking over by the Government of the Missouri River Navigation Company's fleet. The findings disclose the facts. The case, we think, is one of fact.

The petition will be dismissed. It is so ordered.

GREEN, *Judge*, and GRAHAM, *Judge*, concur.

CHARLES H. STANGE v. THE UNITED STATES[1]

[No. F-261. Decided November 4, 1929]

On the Proofs

Income taxes; statute of limitations; waiver of assessment.—An express waiver of all statutory limitations as to the time within

[1] Certiorari granted.

which "assessments" of Federal income taxes may be entered, is a waiver also of the limitation as to collection.

Same; expiration of statutory period; subsequent waiver.—A waiver of the statute of limitations against assessment of Federal taxes is not invalid because made after the expiration of the statutory period.

Same; distribution of surplus through transfer of assets to new corporations; identity of stockholders.—Pursuant to a family arrangement the principal stockholder of a corporation whose stock is owned exclusively by the family, gives part of his shares to the other members, at the same time organizes other corporations whose stock is subscribed for by the stockholders of the old corporation in the same proportion as their new holdings and so issued, with a provision that it could not be sold without first being offered for sale at par to the respective issuing corporation. Shortly thereafter, the old corporation transfers valuable assets to the newly organized corporations and charges the same to its surplus, without cancellation or redemption of any of its stock. Each stockholder of the new corporation is credited with his proportionate share of the appraised value of the assets so transferred, and the new corporations issue to them debenture notes covering the balance after deducting their withdrawals of cash and the par value of their stockholdings. *Held*, (1) that the transaction as a whole was a distribution of part of the old corporation's surplus to its stockholders, taxable as income to the stockholders, and (2) that the value of same for taxation purposes is to be measured by the property actually conveyed, and not by the credit on the books.

The Reporter's statement of the case:

Mr. W. W. Spalding for the plaintiff. *Mason, Spalding & McAtee* were on the briefs.

Mr. Joseph H. Sheppard, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. On February 19, 1915, plaintiff made a return of taxable income in the amount of $824.08 for the calendar year 1914 for taxes imposed by the revenue act of 1913, and thereon paid income taxes of $8.24.

II. In the early part of 1914, and prior to March 24, 1914, plaintiff's father, A. H. Stange, a citizen and resident of Merrill, Wisconsin, decided to divide the greater part of his

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property with his two sons and his four daughters and their husbands. He was at said time the owner of 1,780 of the 2,500 shares of the outstanding stock of the A. H. Stange Company, a corporation.

The organization of the Union Land Company and the Kinzel Lumber Company by Mr. Stange in 1914, the transfer of assets to these companies by the A. H. Stange Company and the issuance by the Union Land Company and the Kinzel Lumber Company of stock and debentures to their stockholders, including plaintiff, as set forth in these findings, were in accordance with directions given by A. H. Stange and by mutual consent of all parties concerned.

III. In accordance with the plans so formulated by A. H. Stange, on March 24, 1914, he organized the corporation, Union Land Company, under the laws of the State of Wisconsin. On May 29, 1914, he organized the corporation, Kinzel Lumber Company, under the laws of the same State. On this last named date, May 29, 1914, the capital stock of the A. H. Stange Company, consisting of 2,500 shares of the par value of $100 each, was reapportioned by A. H. Stange between himself and his children in such manner as to give to himself and each of his sons and daughters (and/or daughters and sons-in-law) one-seventh of such total of 2,500 shares. Such reapportionment represented gifts by A. H. Stange to his sons, daughters, and sons-in-law, in the proportions hereinafter stated.

The ownership of the capital stock of the A. H. Stange Company immediately prior and subsequent to this reapportionment was as follows:

Stockholders in A. H. Stange Company

	Before May 29, 1914	After May 29, 1914
A. H. Stange, father	1,780	358
C. H. Stange, son (plaintiff)	120	357
Aug. J. Stange, son	120	357
Chas. H. Kinzel, son-in-law	120	178
Mrs. C. H. Kinzel, daughter	----------	179
E. W. Ellis, son-in-law	120	178
Mrs. E. W. Ellis, daughter	----------	179
Fred W. King, son-in-law	10	10
Mrs. F. W. King, daughter	110	347
Mrs. R. M. Rogers, daughter	120	357
Total	2,500	2,500

The 120 shares of stock owned by plaintiff prior to such reapportionment were acquired by him by gift from his father, A. H. Stange, 1 share in 1897 and 119 shares in 1902.

On May 29, 1914, the stockholders of the A. H. Stange Company subscribed for the capital stock of the Union Land Company and the Kinzel Lumber Company in the same proportions as they owned stock in the A. H. Stange Company immediately after the reapportionment. The stock of the Kinzel Lumber Company was issued on June 1, 1914, and that of the Union Land Company on June 2, 1914, in the following amounts: By the Union Land Company, stock having a total par value of $245,000; and by the Kinzel Lumber Company, stock having a total par value of $105,000. To plaintiff was issued stock of the Union Land Company having a par value of $35,000 and stock of the Kinzel Lumber Company having a par value of $15,000, being one-seventh of the issued stock of each company, the total par value of the stock of the two companies thus issued to plaintiff being $50,000. All of the certificates of stock so issued by both the Union Land Company and the Kinzel Lumber Company to plaintiff and the other stockholders of these corporations contained a provision that the stock could not be sold without first being offered for sale at par to the corporations, respectively, issuing same.

IV. The following appears in the minutes of a special meeting of the directors of the A. H. Stange Company held at Merrill, Wisconsin, on June 1, 1914:

"To carry into execution the plan for a long time under consideration to discontinue A. H. Stange Co. holdings of cut-over and timbered lands as well as its logging operations, it was moved, seconded, and unanimously carried—

"1. That the following accounts as they will appear on the book of this company as of June 10, 1914, be closed, to wit:

"Pine lands.
"Lincoln County lands.
"General log equipment.
"Camp Pellegrin.
"Camp No. 2.

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"2. That the values, set up opposite the said accounts as they will appear on June 10, 1914, together with the sum of $60,000.00 in cash, be charged against surplus account.

"3. That the officers of this company be and they are hereby authorized to give by proper deeds of conveyance to Union Land Co. (a corporation of Merrill, Wis., composed exclusively of the stockholders of A. H. Stange Co., the respective interests of the stockholders in Union Land Company being equal to their present pro rata holdings in A. H. Stange Co.) all real estate and personal property represented by the above-named accounts together with the sum of $60,000.00 in cash.

"4. That on June 10, 1914, the sum of $300,000.00 be charged against surplus account and cash or its equivalent be given to Kinzel Lbr. Co., a corporation of Merrill, Wisconsin (comprised of the stockholders of A. H. Stange Co., the interests of the stockholders in both corporations being proratably equal)."

V. Thereafter, to wit, on June 10, 1914, the A. H. Stange Company transferred to the Union Land Company cash in the amount of $60,000 and other property consisting of logging equipment and railroads, cut-over lands, and timberlands having a book value of $1,059,667.15, a total of $1,119,667.15. On the same date, June 10, 1914, the A. H. Stange Company also transferred to the Kinzel Lumber Company cash and notes receivable in the amount of $300,000, and one parcel of real estate not carried on the books of the A. H. Stange Company but having a value of $5,000.

Prior to such transfers by the A. H. Stange Company to the Union Land Company and the Kinzel Lumber Company said A. H. Stange Company was engaged in the manufacture of lumber and other wood products from its own timber. In connection with such operations it owned, prior to said transfers, logging railroads and equipment and conducted logging operations in the timber it owned. By said transfers to the Union Land Company and the Kinzel Lumber Company the A. H. Stange Company divested itself of all its logging equipment, railroads, cut-over lands and timberlands, and thereafter confined itself to manufacturing operations from timber purchased from others.

VI. The records and books of account of the A. H. Stange Company reflect the following facts:

Surplus, March 1, 1913	$1, 842, 872. 70
Dividend distribution, July 19, 1913	37, 500. 00
Dividend distribution, Aug. 12, 1913	25, 000. 00
Net earnings, 1913	28, 855. 23
Surplus, December 31, 1913	1, 807, 227. 93
Dividend distribution, Jan. 19, 1914	25, 000. 00
Surplus, June 10, 1914, before transfers	1, 782, 227. 93
Surplus, June 10, 1914, after transfers	362, 560. 78
Net operating loss, 1914	91, 718. 64
Surplus, December 31, 1914	270, 842. 14

The debits to the surplus account of June 10, 1914, to represent the said transfer of assets by the A. H. Stange Company to the Union Land Company and the Kinzel Lumber Company were as follows:

For assets transferred to:	
Union Land Company	$1, 119, 667. 15
Kinzel Lumber Company	300, 000. 00
	1, 419, 667. 15

The income-tax return of the A. H. Stange Company for 1914 showed a net operating loss of the amount above stated, $91,718.64.

Included in each of the above surplus figures, as of March 1, 1913, December 31, 1913, June 10, 1914, and December 31, 1914, was $800,000 of appreciation. On June 30, 1906, the book account entitled "pine lands" was debited with $800,000, and the same amount was credited to the surplus account, to represent appreciation of the company's pine lands from date of acquisition (which went back as to some of the lands to 1895) to the date of the entry. Excluding such appreciation, the surplus account of the A. H. Stange Company showed credit balances on the several dates antecedent to the transfers, as follows:

March 1, 1913	$1, 042, 872. 70
December 31, 1913	1, 007, 227. 93
June 10, 1914, before transfers	982, 227. 93

The net cost to March 1, 1913, of the lands and timber of the A. H. Stange Company owned on that date was $356,397.30. The book value on that date, which included the appreciation item of $800,000 was $1,156,397.30. The net cost on June 10, 1914, of the lands and timber owned by

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the A. H. Stange Company on that date, prior to said transfers, was $236,351.41. Including the appreciation item the book value was $1,036,351.41. The book value of the other assets transferred to the Union Land Company on June 10, 1914, as aforesaid was as follows:

General logging equipment	$15, 944. 13
Camp No. 2	1, 371. 61
Camp Pellegrin	6, 000. 00
Cash	60, 000. 00

VII. Immediately after the transfer of assets by the A. H. Stange Company to the Union Land Company, as above stated, the property so transferred was appraised and entered on the books of the Union Land Company at a value of $3,431,382.61. The lands so transferred consisting of cut-over lands and timberlands had been acquired by the A. H. Stange Company between the date of its organization in 1895 and the date of said transfer, June 10, 1914.

Thereafter, and prior to September 9, 1921, the Union Land Company submitted to the Bureau of Internal Revenue an answered questionnaire relating to the value of said timber and timbered lands as of June 10, 1914, wherein it was stated that the fair market value on June 10, 1914, of said landed properties was not less than $4,512,137.95. Upon consideration of the information contained in said answered questionnaire, engineers of the Bureau of Internal Revenue, under date of September 9, 1921, approved a value of said landed properties of $4,129,968.81. Upon the basis of these various valuations of said timber and timbered lands, the fair market value on June 10, 1914, of the total amount in cash and property transferred by the A. H. Stange Company to the Union Land Company on that date was as follows:

Value set up on the books of the Union Land Company June 10, 1914	$3, 491, 382. 61
Value claimed in questionnaire	4, 572, 137. 95
Value approved by engineers of the Bureau of Internal Revenue September 9, 1921	4, 189, 968. 81

The property so transferred by the A. H. Stange Company to the Kinzel Lumber Company on June 10, 1914, pursuant

to the resolution above quoted, consisted of $300,000 in cash and notes receivable and one piece of real estate having a fair market value of $5,000, such real estate not having been carried upon the books of the A. H. Stange Company, making a total value of property transferred to the Kinzel Lumber Company of $305,000.

VIII. On July 1, 1914, the Union Land Company issued to plaintiff and its other stockholders noninterest-bearing debenture notes, which notes were issued by said company to its stockholders in proportion to their stockholdings, in the aggregate amount of $3,185,000; and on the same day the said Kinzel Lumber Company likewise issued to plaintiff and the other stockholders, also in proportion to their stockholdings, debenture notes in the amount of $140,000.

IX. The account of plaintiff on the books of the Union Land Company shows the following:

That on June 13, 1914, he, plaintiff, was credited with $497,000, representing his proportionate share of the appraised value of the assets transferred to the Union Land Company by the A. H. Stange Company as described above; that on the same date he withdrew $5,000 in cash which was debited to this account; that on the same date there was issued to him capital stock of the Union Land Company of the total par value of $35,000, which was also debited to this account; that on June 16, 1914, he withdrew cash in the further sum of $2,000 which was debited to his account, and that on July 23, 1914, there was issued to him debenture notes as above described in the sum of $455,000, which sum extinguished the balance standing to his credit in this account.

The account of plaintiff on the books of the Kinzel Lumber Company shows the following:

That on June 2, 1914, he, plaintiff, was credited with $45,000, representing his proportionate share of the value of the assets transferred to the Kinzel Lumber Company by the A. H. Stange Company as described above; that on the same date there was issued to him capital stock of the Kinzel Lumber Company of the par value of $15,000 which was debited to this account; that on June 11, 1914, he withdrew cash in the sum of $10,000, this amount also being

debited to this account; and that on July 15, 1914, there was issued to him debenture notes as above described in the sum of $20,000, which sum extinguished the balance standing to his credit in this account.

The debenture notes of the Union Land Company and the Kinzel Lumber Company, respectively, above described, were authorized to be issued by resolutions adopted by the officers and directors of these two companies at corporate meetings held on the 27th day of June, 1914.

X. The conveyances referred to in the foregoing findings were made on June 10, 1914, by the A. H. Stange Company directly to the Union Land Company and the Kinzel Lumber Company without any intermediate transfer made through or to any of the stockholders of said companies. The evidence does not show any contract or agreement for these transfers, but the circumstances in relation to the transfer of property from the A. H. Stange Company to the other two corporations named show that the transfer thereof and the subsequent proceedings recited in the findings with relation to the Union Land Company and the Kinzel Lumber Company, their stocks, stockholders, entries on their books, cash disbursements, issue of debenture notes, and other matters pertaining thereto were made by mutual consent without formal contract by reason of family relationship and were all part of one transaction which resulted in the distribution of a part of the surplus of the A. H. Stange Company in the manner shown in the foregoing findings.

XI. On or about November 14, 1922, plaintiff executed and filed with the Bureau of Internal Revenue, a written waiver, which was approved and accepted in writing by the Commissioner of Internal Revenue on or about March 16, 1923, which instrument is in words and figures as follows:

"C. H. Stange, of Merrill, Wisconsin, in consideration of the assurance given him by officials of the Income Tax Unit of the Bureau of Internal Revenue that his liability for all Federal taxes imposed by the act of Congress approved October 3, 1913, and also by the act of Congress approved September 8, 1916, as amended by the act of Congress approved October 3, 1917, on his net income re-

ceived from all sources in the year ended December 31, 1914, and in the year ended December 31, 1917, respectively, shall not be determined except after deliberate, intensive, and thorough consideration, hereby waives any and all statutory limitations as to the time within which assessments based upon such liability may be entered. It is understood, however, that the above-named individual does not, by the execution of this waiver, admit in advance the correctness of any assessment which may be made against him for the said years by the officials of the Income Tax Unit.

"(S.) C. H. STANGE,
"(S.) D. H. BLAIR,
Commissioner of Internal Revenue.

"(Stamp.) Approved Mar. 16, 1923.
"MERRILL, WISCONSIN, *November 10, 1922.*"

XII. The distributions of stock and debenture notes as described above were never returned as taxable income by plaintiff. The Commissioner of Internal Revenue determined the value of all assets transferred, as above stated, by the A. H. Stange Company to the Union Land Company on June 10, 1914, to be $4,189,968.81. The Commissioner of Internal Revenue also determined the value of the assets transferred by the A. H. Stange Company on the same date to the Kinzel Lumber Company to be $305,000, thus making an aggregate value of all assets so transferred to both new corporations, of $4,494,968.81. The Commissioner of Internal Revenue then divided this aggregate sum by seven and determined that the quotient ($642,138.40) was additional taxable income received by plaintiff in 1914 and in February, 1924, assessed additional income tax thereon against the plaintiff for 1914 in the sum of $28,992.55, which together with interest in the amount of $1,787.21 the plaintiff paid on March 19, 1925.

XIII. On or about March 30, 1926, plaintiff presented to the commissioner a claim for the refunding of $30,779.76 assessed and collected as stated in the preceding finding on the ground that no taxable dividend to the plaintiff resulted from the transactions set forth in Findings II to X inclusive. On June 8, 1927, the plaintiff presented to the commissioner a supplemental claim for refund covering the same payment of taxes and based on the ground that the

bar of the statute of limitations had run against the collection of said taxes long prior to the time when the payment thereof was demanded and made by plaintiff. The claim for refund first made was formally rejected May 26, 1926. No action was taken on the supplemental claim for refund presented June 8, 1927.

The court decided that plaintiff was not entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

This case involves taxes for the calendar year of 1914 assessed under the revenue act of 1913, and for which an income-tax return was filed by the plaintiff on February 19, 1915. The other facts material to the decision may be summarized as follows:

A. H. Stange, father of plaintiff, prior to March 24, 1914, was the owner of 1,780 shares of the 2,500 shares of the stock in the A. H. Stange Company, a corporation, the remainder of this stock being held by his sons and daughters, or daughters and sons-in-law. On March 24, 1914, A. H. Stange organized a corporation known as the Union Land Company and on May 29, 1914, another corporation known as the Kinzel Lumber Company. On the last-named date the 2,500 shares of the capital stock of the A. H. Stange Company were reapportioned between Mr. Stange and his children in such manner as to give Mr. Stange and each of his sons and daughters (or daughters and sons-in-law) one-seventh of the said 2,500 shares. Prior to the reapportionment the plaintiff owned 120 shares in said company and after it was made, 357.

On June 10, 1914, pursuant to a resolution adopted by the board of directors, the A. H. Stange Company transferred to the Union Land Company cash in the amount of $60,000 and other property having a book value of $1,059,667.15, or a total of $1,119,667.15, and also in the same manner to the Kinzel Lumber Company cash and bills receivable in the total amount of $300,000 and a parcel of real estate valued on the books at $5,000. When these assets were tranferred to the two companies the surplus account of the Stange Company was debited with the value of said assets. The Union

Land Company entered on its books the assets so transferred to it at a total valuation of $3,491,382.61, and the Kinzel Lumber Company in the same manner entered on its books the assets which it received in the total sum of $305,000.

The assets conveyed to the two companies were credited to the individual stockholders thereof in proportion to their respective interest in the A. H. Stange Company as shown by their stockholdings. In this manner the plaintiff was credited with $45,000 on the books of the Kinzel Lumber Company on June 2, 1914, and $497,000 on the books of the Union Land Company on June 13, 1914. At the last-named date the plaintiff withdrew from the Union Land Company $5,000 in cash which was charged to his account and the company issued to him capital stock of a par value of $35,000 which was also charged to his account. On June 16, he withdrew the further cash sum of $2,000 and on July 23, 1914, the company issued to him debenture notes in the sum of $455,000, both of which items were debited to his account. The total of all these debits balanced and extinguished the original credit of $497,000 in the plaintiff's account. In the same manner plaintiff's credit account with the Kinzel Lumber Company was balanced by issuing to him stock of the par value of $15,000, cash $10,000, and debenture notes $20,000.

On November 14, 1922, the plaintiff executed and filed with the Bureau of Internal Revenue a written waiver of statutory limitations approved and accepted by the commissioner as set forth in Finding XI. The Commissioner of Internal Revenue determined that the total value of all assets transferred by the Stange Company to the Union Land Company and the Kinzel Lumber Company to be $4,494,968.81 and allocated one-seventh of this value ($642,138.40) as taxable income to the plaintiff for the year 1914, and thereon in February, 1924, made an additional assessment of income taxes for 1914, which together with interest amounted to $30,779.76, which the plaintiff paid under protest on March 19, 1925. Thereafter on March 30, 1926, and on June 8, 1927, the plaintiff submitted to the Commissioner of Internal Revenue a claim for refund and a supplement thereto. These

claims for refund give rise to the following objections which the plaintiff makes to the validity of the tax assessed:

(1st) That the transaction involved constituted the distribution of the assets of the A. H. Stange Company and was not a taxable dividend.

(2d) That the waiver of the statute of limitations was confined merely to the assessment of the tax and did not waive the bar of the statute as to the collection thereof, and was executed after the expiration of the period of limitations.

(3d) That in any event plaintiff's taxable income as a result of the transactions involved could have been no greater than the amount credited to him on the books of the transferee companies, being a total of $542,000 instead of the amount of $642,138.40.

(4th) That the several acts of A. H. Stange and the corporations controlled by him herein involved were merely steps taken at the direction of the said A. H. Stange to effectuate a gift to his son, the plaintiff herein, and for that purpose constituted one transaction, and that the property received by plaintiff was a nontaxable gift from father to son to the extent of 237/357 thereof.

We will first consider the claim of the plaintiff that the stock, cash, and debentures received by him, as above, set forth, constituted a distribution in partial liquidation of the assets of the A. H. Stange Company.

It seems to be conceded in argument by both parties that the various acts by which certain property of the A. H. Stange Company was transformed into cash, debenture notes, and stock in the Union Land Company and the Kinzel Lumber Company constituted in reality one transaction and the findings of fact so state. Plaintiff contends that this was a distribution in partial liquidation of the assets of the Stange Company. The 1928 revenue act defines " amounts distributed in partial liquidation " as,

"A distribution by a corporation in complete cancellation or redemption of a part of its stock, or one of a series of distributions in complete cancellation or redemption of all or a portion of its stock."

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A regulation to this effect had been in force for sometime prior to the passage of the last-named act and the part of the act which we have quoted, as we think, was merely the adoption in the statute of a principle of accounting already well settled. At all events we think the instant case is controlled in this respect by the case of *Rockefeller* v. *United States*, 257 U. S. 176, an exactly parallel case with the one at bar. In the *Rockefeller case* a corporation engaged in producing, buying, and selling crude petroleum and transporting it through its pipe lines formed a new corporation to which the pipe-line property was conveyed. In consideration for this conveyance and as a part of the transaction, the new corporation issued all of its capital stock to the stockholders of the old corporation pro rata. The old company remained in business and retained sufficent assets to cover its capital obligations, and the transfer of assets to the new corporation did not result in a reduction of its outstanding stock. The slight difference in the nature of the facts between that case and the one at bar is immaterial to the legal questions involved. It appeared in the *Rockefeller case*, *supra*, that the stock of the new corporation was a consideration for the conveyance. In the instant case the record is silent on the subject of consideration except as may be inferred from the facts. The whole transaction was a family matter carried out in pursuance of a plan of A. H. Stange, the father, as a result of which certain property of the A. H. Stange Company passed to the two other corporations and the plaintiff received in lieu of the interest which he possessed therein as a stockholder of the A. H. Stange Company, cash, debenture notes, and stock of the new corporations. That it was a distribution of a part of the surplus of the A. H. Stange Company is quite clear. In fact this is conceded in argument by the plaintiff, but plaintiff says that the distribution was not in the way of a dividend but in partial liquidation. The fact is that there was no cancellation or redemption of any part of the stock of the A. H. Stange Company. We think this was necessary to sustain the claim that there was partial liquidation and in this we are sustained by the decision in the *Rockefeller case* wherein

a practically similar transaction was held to be a dividend. In that case the court said:

"We deem it to be too plain for dispute that * * * the new pipe line company shares were in substance and effect distributed by the oil company to its stockholders; * * * in effect a dividend out of the accumulated surplus."

In the case at bar, after transfers were made by the A. H. Stange Company it still had a surplus of $362,560.78.

In *Lynch* v. *Hornby*, 247 U. S. 339, it was held that the 1913 revenue act imposed a tax upon—

"* * * all dividends declared and paid in the ordinary course of business by a corporation to its stockholders after the taking effect of the act (March 1, 1913), whether from current earnings, or from the accumulated surplus made up of past earnings or increase in value of corporate assets, notwithstanding it accrued to the corporation in whole or in part prior to March 1, 1913,"

and a distinction is drawn between this case and the case of *Lynch* v. *Turrish*, 247 U. S. 221, relied upon by plaintiff's counsel. It follows that if we are correct in holding the distribution to be in effect a dividend, it was taxable under the 1913 act notwithstanding the distribution was of the accumulated surplus made up of past earnings or increase in the value of corporate assets.

We have hereinabove referred to the acts which resulted in the distribution of certain of the surplus of the A. H. Stange Company among the children of A. H. Stange, as one transaction. The plaintiff insists that beginning with the redistribution of the stock of the A. H. Stange Company whereby the children and the children-in-law of A. H. Stange received more stock than they had heretofore held, there was only one transaction. We do not consider this material. What we are here concerned with is the distribution of the surplus of the A. H. Stange Company to its stockholders. The gift from A. H. Stange to his children was not taxable. The distribution of the surplus of the A. H. Stange Company to its stockholders was taxable whether it was only part of some inclusive transaction or not. There seems to have been some confusion of thought on this point. What we are

holding was subject to a tax, is not a gift, but the distribution of property by a corporation. A. H. Stange was merely a stockholder in the A. H. Stange Company. He could not give away any of the property of this company or distribute it in any manner. That had to be done by an act of the corporation itself, and the fact that A. H. Stange practically controlled the corporation's acts does not alter the legal effect.

It is also contended by plaintiff that the only amount that is taxable is the credit which was given the plaintiff on the books of the new companies, but what the plaintiff got in the distribution was stock, cash, and debenture notes. So far as the value of the property of the A. H. Stange Company which was distributed is concerned, there is no question but that the commissioner put a moderate valuation thereon. All of this property so distributed went to the new companies and plaintiff and the other heirs held the same proportionate interest therein through stock that they held in the A. H. Stange Company. It is quite evident that it was intended by the several transactions to so distribute the property that each of the heirs would receive his proportionate value of the property received by the new companies. Whether we place the calculation of the dividend upon the value of the property conveyed to the new companies or whether we place it upon the value of the stock, cash, and debenture notes received, the result is the same for there is no proof that the combined value of what was received by the plaintiff in the end was not equal to the value of his interest in the property conveyed. Indeed the nature of the transaction indicates that it was.

The plaintiff's argument that the collection of the tax was barred by the statute of limitations is based on the claim that the waiver signed by plaintiff and the Commissioner of Internal Revenue was invalid because made after the expiration of the statutory period; and because by the terms thereof it was confined to the assessment of the tax, whereas the statute required the commissioner and taxpayer to "consent in writing to a later determination, assessment, and collection of the tax." The latter objection will be first considered.

The ordinary meaning of the word "assess," when used in connection with matters of taxation, is to fix the amount to be paid by the taxpayer. An assessment can only be made if the taxpayer is liable for the tax, and if liable for the payment of the tax it follows that it was collectible. In other words, a prerequisite of the right to assess is the right to collect the tax when assessed. It would seem, therefore, that an agreement for an assessment was based upon the understanding that the tax was collectible if assessed. However this may be, we think that a waiver of the statute of limitations is a contract, and that even if the statute has run, the moral obligation to pay a tax properly imposed is sufficient to constitute a consideration. The waiver in the case at bar, which is set out in Finding XI, set out a special consideration under which the commissioner agreed to exercise "deliberate, intensive, and thorough consideration" of the liability of plaintiff for the taxes which were to be assessed. Possibly this was the commissioner's duty in any event, and it might also be said that the statutes give him no authority to make a special agreement of this kind; but there was, as we have already seen, a consideration for the waiver and an understanding, as there always is when waivers are executed, that further time will be taken for the consideration of the taxpayer's claims. In construing the waiver, the rules with reference to the construction of contracts should be applied. If the waiver did not authorize the collection of the tax, its execution was an idle performance—it was nothing but a useless scrap of paper. Whether plaintiff so intended or not, he and his attorneys must have known that the commissioner accepted the waiver believing that it authorized the collection of any tax properly assessed. In such case, the rule with reference to contracts is—

"The language of a contract in case of ambiguity should be interpreted in the sense that the promisor knew or had reason to know that the promisee understood it." (13 C. J. sec. 484 c., page 523, and cases cited, page 526.)

It should be said also that the words "assess" and "assessment," when used with reference to taxes, often in-

clude the collection thereof as a necessary sequence. In fact the term "assess" is used at times to include all the steps involved in imposing a tax on property (*Allen* v. *McKay*, 120 Cal. 332), and "to assess" often means to levy a tax (see cases cited under note 76, 5 C. J. 813), the two words being used with practically the same meaning, *Idem*, 76 (b), and the words "to levy" always include the collection of a tax. The same rule applies to the word "assessment," and the parties evidently intended that the word "assessment" should also cover the collection of the tax.

For the reasons stated above we think that the waiver removed the bar of the statute of limitations not only as to assessment but as to collection of the tax.

It is further insisted that the statute providing for waivers had no application to waivers executed after the running of the statute of limitations, and the case of *Joy Floral Co.* v. *Commissioner*, 29 Fed. (2d) 865, overruling 7 B. T. A. 800, is cited as so holding. In the case at bar the tax was assessed under section 250 (d) of the revenue act of 1921, which provided that as to taxes due for any prior year, they "shall be determined and assessed within five years after the return was filed, unless both the commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax." The *Joy Floral Co. case*, *supra*, discusses similar provisions contained in section 278 of the revenue act of 1924, under which the assessment was made in that case, and section 276 of the revenue act of 1928. In the two last-named sections the words "have consented" are used instead of the word "consent" in section 250 (d) of the act of 1921. We do not think the difference is material for reasons hereinafter given, but the *Joy Floral Co. case* holds that the commissioner had no authority to enter into an agreement with the taxpayer for a waiver of the statute of limitations after the expiration of its limitation. The argument made in support of this decision is that the commissioner's signature, after the statute of limitations had run, was unimportant. This statement loses its force when it is considered that it is just as important at that period as it would have been before the limitation had run. In the absence of a statu-

tory provision either before or after the running of the statute of limitations the taxpayer could, by a mere oral statement, waive the running of the statute. Even after the running of the statute, the moral obligation to pay any taxes that were properly levied would be a sufficient consideration for the waiver. The reason for having the commissioner sign the waiver had, in our opinion, nothing to do with its validity. The purpose of the statutory provision was to do away with the uncertainties of oral agreements. An oral statement on the part of the taxpayer would be subject to dispute and controversy as to its form and meaning, but Congress made it clear and definite that the taxpayer should not be bound unless written evidence of such waiver could be produced. On the part of the Government, it was always understood, if not by implication agreed, that the execution of these waivers would stay proceedings for the collection of the tax until the Government could properly consider the claims of the taxpayer. Congress did not intend that the Government should be bound in any way by the acceptance of waivers made by numerous collectors and revenue agents scattered all over the country but only in case the agreement was signed by the Commissioner of Internal Revenue. It was necessary for the orderly conduct of the Government's business that the commissioner should have full knowledge of the action taken. In this we find abundant reason for the requirement of the signature of the officer and, as we think, the only reason why it was required. To hold that the statute requires the commissioner to consent to the waiver before the expiration of the period of limitation is to engraft upon the statute something which certainly is not contained within its provisions nor, as we think, is there any reason to infer that such was the intent of Congress.

In the same case of the *Joy Floral Co.*, *supra*, much stress was laid upon the fact that in the revenue acts of 1924 and 1928 the statute provided in effect that the waiver would only be effectual where both the commissioner and the taxpayer "have consented" thereto in writing, and it is said the provisions just mentioned should be considered as interpretive of the language used in the 1921 act. It appears

to have been thought that the use of the word "have" before the word "consented" implied that this action must have been taken before the expiration of the period of limitation. If Congress had intended that the waiver must be executed before the period of limitations had expired, we think it would have said so. But it did not and we see no justification for this construction which we think is neither grammatical nor logical. Whether the word "consent" is used alone, as it was in the 1921 act, or the words "have consented" are used, as in the 1924 and 1928 acts, is immaterial. If a prior "consent" is required, then the parties must "have consented." The latter expressions are merely a paraphrase. In any event the parties must "have consented" to the waiver prior to the time of the collection of the tax and the words in the later statutes merely express the natural sequence of the two events. This is true even though the 1921 act be construed literally and strictly. In our opinion the decision of the Board of Tax Appeals is supported by the better reasoning, and the objections of the plaintiff to the validity of the waiver must be overruled.

From what we have stated above, it follows that the plaintiff's petition must be dismissed and it is so ordered.

BOOTH, *Chief Justice*, concurs.

GRAHAM, *Judge*, concurs in the findings and the result.

INTERNATIONAL PAPER CO. v. THE UNITED STATES [1]

[No. C–668. Decided November 4, 1929]

On the Proofs

Eminent domain; water-power rights; contract substituted for taking; frustration of contract with third party; incidental damages.—A company, engaged in the manufacture of newsprint paper, by contract therewith obtained its power from water taken by a power company from Niagara River, above the Falls. The intake of the paper company's canal led from the power company's main canal and after the water had served its

[1] Certiorari granted.

purpose it was discharged through the power company's tailrace tunnel into the gorge below the Falls. The water taken by the power company direct from the river was by revocable license or permission of the United States, and, with the exception of that portion directed into the paper company's canal, used to generate electric power which was sold to other parties. By treaty the United States and Canada were limited in the amount of water taken from Niagara River for power purposes. Subsequent to a determination by the Council of National Defense that the manufacture of newsprint paper was a nonessential industry the Secretary of War, December 28, 1917, issued an instrument in writing purporting to "order" and "requisition" from the power company the total output of electrical power possible through its intake from the river, and at the same time the power company waived its right to compensation "by reason of said order and requisition" in consideration of permission to continue business, subject to exigencies of the national defense, and the United States waived delivery of power to it on condition that the power company should distribute its power to designated private parties. The schedule naming them did not include the paper company and the power company stopped the output of water thereto. *Held*, (1) that the paper company's rights were limited by its contractual relations with the power company, which could give it no higher rights than the power company possessed; (2) that the right of the power company to take water was subject to the revocable license to use; (3) that the paper company was deprived of its contract by a contract entered into by the power company voluntarily with the Government, and the right of action, if any, was against the power company; and that if the transaction be construed as a taking, (4) there was no taking of anything belonging to the paper company; (5) the thing taken was merely the product of the power company; (6) such taking did not include the res, as in the *Duckett case*, 266 U. S. 149, but was merely a frustration of the paper company's contract as in the *Omnia Co. case*, 261 U. S. 502, 511, with only incidental damages; (7) such right as the paper company might have was subject to the treaty between Great Britain and the United States and the constitutional power of Congress to control navigable rights, and therefore not vested; and (8) the taking was not for public use.

The Reporter's statement of the case:

Mr. Montgomery B. Angell for the plaintiff. *Messrs. William C. Cannon* and *William R. Carlisle*, and *Stetson, Jennings & Russell* were on the briefs.

Mr. Dan M. Jackson, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff, International Paper Company (hereinafter referred to as paper company), is a corporation created and organized on January 31, 1898, under the laws of the State of New York, with its principal office and place of business at Corinth, Saratoga County, New York, and having a general office located in the city of New York, New York. Since its organization it has been engaged in the business of manufacturing, purchasing, selling, and dealing generally in paper and any and all products and compounds thereof, and materials used in connection with such manufacture, including the manufacture of wood pulp and other fibers. At all times material to this cause of action, the paper company owned and operated some fifteen paper mills located at different points in New York and New England, including a paper mill at Niagara Falls, New York, hereinafter sometimes referred to as "Niagara Falls Mill." The plant of the Niagara Falls Mill was located on the American side of the Niagara River between a mile and a mile and three-quarters above the Falls of Niagara, within the city limits of the city of Niagara Falls, Niagara County, New York.

II. During December, 1917, and for many years prior thereto, the Niagara Falls Mill of the paper company was engaged in producing wood pulp and other constituent pulps and the manufacture therefrom of newsprint paper for sale to various newspapers and users of newsprint paper throughout the United States. The power used in its manufacturing operations was derived from six water wheels or water turbines, located in a wheel pit on its property some 175 feet below the surface. The paper company obtained the water necessary for the operation of these six wheels from the main power canal of the Niagara Falls Power Company (hereinafter sometimes referred to as the power company), which was located adjacent to and directly above the Niagara Falls Mill on the banks of the Niagara River. The main intake canal of the power company took its supply of water

from the Niagara River. A small side canal leading into the Niagara Falls Mill tapped the main power canal of the power company some 300 feet from the point of intake of the main power canal from the Niagara River. The water taken by the paper company through this side canal was carried through a surface canal to its flumes, thence down the penstock and so to the water wheels in the wheel pit. After the water had served its purpose in turning the water wheels, it was discharged into a tailrace tunnel, which joined the main tailrace tunnel of the power company and was ultimately discharged into the Niagara River gorge below the Falls of Niagara. The sketch, attached to the amended petition herein as Exhibit A, shows the geographical relationship of the International Paper Company's Niagara Falls Mill and the Niagara Falls Power Company's plant.

III. The Niagara Falls Power Company is a corporation organized under the laws of the State of New York with its principal place of business at Niagara Falls, New York. It was formed by a consolidation, effective October 31, 1918, of the Niagara Falls Power Company (constituent), Hydraulic Power Company of Niagara Falls, and the Cliff Electrical Distributing Company, pursuant to chapter 596 of the laws of New York of 1918, and in accordance with a certain joint agreement of consolidation dated September 20, 1918. The Niagara Falls Power Company (constituent) was organized in 1886 under a special act of the Legislature of the State of New York, chapter 83 of the laws of 1886, under the name of the Niagara River Hydraulic Tunnel Power & Sewer Company of Niagara Falls. It was organized for the purpose, among other things, of furnishing hydraulic power for manufacturing purposes in the town of Niagara Falls and in the county of Niagara. Among its specified powers, as granted by the Legislature of the State of New York, were the following:

"(a) To convey lands;

"(b) To sell, lease, and supply the waters taken from the Niagara River between certain specified points or the power to be developed therefrom for manufacturing, electrical, or power purposes." (Chap. 109, § 2, Laws of N. Y., 1889.)

Its name was changed to the Niagara Falls Power Company by order of the Supreme Court of the State of New York, dated November 11, 1889.

IV. The power company (constituent) acquired lands bordering upon the shores of the Niagara River just above the Falls of Niagara, constructed a plant thereon, and took and used water from the Niagara River to furnish hydraulic power for manufacturing purposes and to manufacture electrical power. The claim of right of the original power company and its successor, the present power company, to take, use, sell, lease, and supply water from the Niagara River was and is derived from the following sources:

"(a) Private grants in fee of lands bordering on the Niagara River extending upwards of some two miles in length above and below the point of intake of the power company's canal, and including the point of intake.

"(b) Letters Patent from the State of New York dated December 31, 1891, and March 3, 1892, and recorded respectively in Book of Patents No. 44, page 487, and Book of Patents No. 48, pages 401–403, granting to the power company as the owner of the uplands, certain lands under water and between high and low water mark in the bed of the Niagara River in front of and adjacent to the uplands owned by the power company;

"(c) Special acts of the Legislature of the State of New York specifically granting to the power company the right to take, use, store, sell, and lease water from the Niagara River, viz: Chapter 83 of the Laws of 1886; chapter 109 of the Laws of 1889; chapter 253 of the Laws of 1891; chapter 513 of the Laws of 1892; chapter 477 of the Laws of 1893."

During the year 1917 and for many years prior thereto the power company owned and operated two hydroelectric plants, one on either side of its intake canal. In these plants it generated electrical energy by power obtained from the waters diverted by it from the Niagara River through its main power canal. The water so used by it and the water taken by the paper company through the side intake canal was part of the water which the power company diverted from the Niagara River.

Reporter's Statement of the Case

V. On March 19, 1906, the American members of the International Waterways Commission, a commission created in 1902 (32 Stat. 373), rendered a report in which it was recommended that the amount of water thereafter to be diverted from the Niagara River above the Falls of Niagara on the American side should be limited to 18,500 cubic feet per second (c. f. p. s.), and that permits should be granted to users located on the American side as follows:

Niagara Falls Power Company	8, 600 c. f. p. s.
Niagara Falls Hydraulic Power & Manufacturing Company (the predecessor of the Hydraulic Power Company of Niagara Falls)	9, 500 c. f. p. s.
Erie Canal and its tenants	400 c. f. p. s.
Total	18, 500 c. f. p. s.

The Burton law (34 Stat. 626) authorized the Secretary of War to grant permits for the diversion of 15,600 c. f. p. s. of water from the Niagara River. Pursuant to this statute, the Secretary of War issued the following permits for a limited period of time:

Niagara Falls Power Company	8, 600 c. f. p. s.
Niagara Falls Hydraulic Power & Manufacturing Company	6, 500 c. f. p. s.
Erie Canal and its tenants	500 c. f. p. s.
Total	15, 600 c. f. p. s.

VI. In May, 1910, a treaty between the United States and Great Britain, governing the taking of water from the Niagara River, was promulgated (36 Stat. 2448). This treaty provided that the United States might authorize the diversion from the Niagara River above the Falls in the State of New York for power purposes of an amount of water not exceeding in the aggregate a daily diversion at the rate of 20,000 c. f. p. s., and the Dominion of Canada might authorize a like diversion of water from the Niagara River in the Province of Ontario for power purposes not exceeding in the aggregate a daily diversion at the rate of 36,000 c. f. p. s. This treaty remained in force unmodified, at all times material to this action.

VII. At all times between August 16, 1907, and March 4, 1913, the power company was authorized by the Secretary

of War, acting pursuant to statutes or resolutions of Congress, to divert water in the amount of 8,600 c. f. p. s. from the Niagara River above the Falls of Niagara. The United States did not undertake to issue any licenses covering the diversion of water from the Niagara River above the Falls between March 4, 1913, and January 19, 1917. During this period the power company continued to take from the Niagara River the amount of water it had theretofore been taking and no objection to such diversion was ever made by the United States.

On January 19, 1917, the Secretary of War issued to the power company the following license:

"PERMIT FOR ADDITIONAL DIVERSION OF WATER FROM THE NIAGARA RIVER

"Subject to the provisions of the joint resolution of Congress, approved January 19, 1917,[1] 'authorizing the Secretary of War to issue temporary permits for additional diversion of water from the Niagara River,' permission, revocable at will, is hereby given the Niagara Falls Power Company, of Niagara Falls, New York, to divert water for power purposes additional to the eight thousand six hundred (8,600) cubic feet per second, the amount of water being diverted by said company on the date of the approval of said resolution, such additional amount not to exceed a daily diversion at the rate of one thousand four hundred (1,400) cubic feet per second. This permit, unless sooner revoked, shall expire in any event with the thirtieth day of June, nineteen hundred and seventeen, and is subject to further conditions as follows: * * *"

Under date of July 2, 1917, the following letter was directed to the power company:

The NIAGARA FALLS POWER CO.,
Niagara Falls, N. Y.

GENTLEMEN: The following notation has been added to the department's copy of the permit of January 19th, 1917, to the Niagara Falls Power Company for additional diversion of water from the Niagara River:

"War Department, June 30, 1917. In accordance with the provisions of S. J. Res. 13, 65th Congress,[2] approved

[1] 39 Stat. 867.
[2] 40 Stat. 241.

this date, the foregoing permit is hereby continued in force until July first, 1918, subject to all of the conditions and restrictions therein contained, prompt report of all additional power furnished under this extension to be made in the manner specified in condition one.

"NEWTON D. BAKER,
"*Secretary of War*."

By direction of the Chief of Engineers:
Very respectfully,

C. KELLER,
Lt. Col., Corps of Engineers.

On July 1, 1918, the Secretary of War issued the following permit to the power company:

"PERMIT FOR THE DIVERSION OF WATER FROM NIAGARA RIVER FOR POWER PURPOSES

"Subject to the provisions of the joint resolution of Congress, approved June 29, 1918,[3] authorizing the Secretary of War to issue permits for the diversion of water from the Niagara River, permission, revocable at will by the Secretary of War, is hereby given the Niagara Falls Power Company, a corporation organized under the laws of the State of New York and now actually producing power from the waters of said river, to divert water in the United States from the said river above the Falls for the creation of power, provided that the quantity diverted by the said company shall in no event exceed in the aggregate a daily diversion at the rate of ten thousand cubic feet per second, and that this permission shall be subject to further conditions, as follows: * * *."

This permit of July 1, 1918, continued in effect until July 30, 1919, when the Secretary of War issued another permit to the power company (consolidated) covering the diversion of 19,500 cubic feet of water per second from the Niagara River.

At no time were these licenses or any of them ever modified or revoked.

The act of June 29, 1906, 34 Stat. 626, commonly known as the Burton Act, in section 5 provides that the provisions of the act should remain in force for three years from the date of passage unless sooner revoked by the Secretary of

[3] 40 Stat. 633.

War. The act was extended by joint resolutions of the Senate of March 3, 1909, 35 Stat. 1169, for two years, and by joint resolution, 37 Stat. 43, approved August 22, 1911, extending the time until March 1, 1912, and by joint resolution, 37 Stat. 631, approved April 5, 1912, extending time to cover the period from March 1, 1912, to the 4th day of March, 1913.

VIII. On the 7th day of March, 1896, the power company executed a deed, which is duly recorded, conveying a tract of land to the paper company, copy of which deed is attached to plaintiff's amended petition as Exhibit B, and is made a part hereof by reference.

On said date the power company executed a lease, which is duly recorded, and copy of which is set out as plaintiff's Exhibit C and made a part hereof by reference.

On January 1, 1898, the plaintiff procured from Niagara Falls Paper Company a deed, copy of which is attached to plaintiff's amended petition as Exhibit D, and is made a part hereof by reference.

On June 1, 1898, plaintiff procured from the Niagara Falls Power Company an agreement attached to plaintiff's amended petition as Exhibit E and made a part hereof by reference.

The paper company from time to time duly exercised the option contained in the lease of March 7, 1896, and took and used additional blocks of water in accordance therewith. In January, 1918, the paper company at its Niagara Falls mill was taking and using from the main power canal of the power company an amount of water sufficient to develop 8,156.25 horsepower. This was equivalent to approximately 720 c. f. p. s. of water. During the several years preceding 1918, the paper company had paid to the power company for the right to take and use this amount of water an annual rental of $75,562.50.

The tract of land upon which the Niagara Falls Mill was located was separated both from the Niagara River and the main power canal of the power company by a strip of land reserved by the power company at the time of the grant of the Niagara Falls Mill tract in 1896. The paper company's property did not touch the Niagara River at

any point, and there was no source from which the paper company could obtain water for the purpose of running the Niagara Falls Mill other than the power canal of the power company.

At the time of the shutdown in February, 1918, hereinafter described in detail, the machinery with which the Niagara Falls Mill was equipped for developing its needed power could be driven only by water power applied directly. The use of steam in place of water as the source of power would have been impractical because of the prohibitive cost. On account of existing war conditions and because the manufacture of newsprint paper was considered by the Council of National Defense as a nonessential industry, it was impossible to obtain either electric-power machinery in replacement of the water-driven machinery or the electric power with which to run such machinery. At this time the usefulness of the Niagara Falls Mill as a going concern was dependent wholly upon its ability to obtain water from the power canal of the power company.

IX. During the latter part of 1917 it was brought to the attention of the Secretary of War that there was a disposition on the part of the Canadian Power Administrators to forbid the exportation to the United States of power developed on the Canadian side of the Niagara River at Niagara Falls. The Secretary of War was advised that if this should be done it would seriously interfere with many industries located in and around Niagara Falls which were essential to the war activities of the United States. One of the reasons for this attitude of the Canadian authorities was the feeling on their part that a portion of the power generated at Niagara Falls was being used for industries which were not essential for the prosecution of the war. At or about this time the Secretary of War appointed Robert J. Bulkley to act as his representative in the administration of power at Niagara Falls. He directed Mr. Bulkley to investigate the situation which was threatening there and to negotiate, inquire into, and work out the details of policies, the actual execution of which should and finally did rest with the Secretary of War.

Following numerous conferences, in which it was agreed that the manufacture of newsprint paper was a nonessential industry and should give way to the manufacture of war materials, the Secretary of War through his representatives assured the Canadian Government that he would cooperate in conserving power manufactured at Niagara Falls and devote it to war uses if the Canadian Government would agree to continue to permit power to be exported from Canada to the United States at Niagara Falls. The ultimate objective of the Secretary of War was to make the maximum use of all power available at Niagara Falls, whether developed on the American side or imported from Canada for essential war uses to the extent that power was needed for them, and to give priority in respect of power to the essential industries.

X. On December 10, 1917, Robert J. Bulkley, acting in his capacity as legal adviser of the War Industries Board and the Council of National Defense and as the personal representative of the Secretary of War, wrote to F. L. Lovelace, secretary of the power company, as follows:

COUNCIL OF NATIONAL DEFENSE,
Washington, December 10, 1917.

F. L. LOVELACE, Esq.,
Niagara Falls Power Co., Niagara Falls, N. Y.

DEAR MR. LOVELACE: We have been somewhat delayed in getting out our orders in the Niagara Falls power situation, as some reports that we have called for are just coming in now.

* * * * * * *

Kindly advise us immediately of the rights of the International Paper Company to take water from your company's canal. I would appreciate your sending us copies of any contracts or agreements existing between your company and the International Paper Company on this subject.

Very truly yours,

ROBERT J. BULKLEY.

On December 13, 1917, F. L. Lovelace, secretary of the Niagara Falls Power Company, in response to the letter above set out, wrote Mr. Bulkley as follows:

Reporter's Statement of the Case

THE NIAGARA FALLS POWER COMPANY,
December 13, 1917.

Hon. ROBERT J. BULKLEY,
Council of National Defense, Washington, D. C.

DEAR MR. BULKLEY: Your letter of the 10th inst. is received and its contents have been noted with interest.

INTERNATIONAL PAPER COMPANY

By warranty deed dated March 6, 1896, this company conveyed to Niagara Falls Paper Company 11.75 acres of land (about opposite the entrance of our intake canal) "together with three thousand horsepower." By a separate indenture under the same date this company agreed to permit the paper company to take and discharge as specified in the agreement additional amounts of water for the production of power "up to the full amount of the capacity of the present discharge tunnel" of the paper company.

The paper company definitely called for an aggregate of 7,200 h. p. Measurement made in the manner provided in the agreement, however, indicated the capacity of the paper company's tunnel and that company's actual use to be 956.25 h. p. in excess of the 7,200 h. p. definitely called for.

The measurements were accepted and for several years past invoices and payments have been based thereon. The paper company pays for 3,000 h. p. provided under the terms of the deed at the rate of $8 per h. p. per year, and for the remaining 5,156.25 h. p. it pays at the rate of $10 per h. p. as provided in the agreement.

With the consent of this company and, I understand, by written grants the International Paper Company has duly succeeded to all the estate and rights of Niagara Falls Paper Company.

The current terms of renewals of the rights under the agreement will expire October 1, 1926, and, pursuant to the terms of the agreement, the paper company has the further option to renew for additional terms extending not later than January 1, 1936. Corporate.

I am sending you under separate cover, together with a carbon copy hereof, copies of the following instruments:

(1) Deed executed by the Niagara Falls Power Company to Niagara Falls Paper Company, dated March 7, 1896, and recorded in Niagara County clerk's office April 9, 1896, in book 242 of deeds at page 232.

(2) "Lease of additional power," being an agreement executed by and between the Niagara Falls Power Company and Niagara Falls Paper Company, dated March 7, 1896.

(3) Agreement by and between the Niagara Falls Power Company and International Paper Company, dated June 1, 1898.

(4) "Renewal of term of agreement of March 7, 1896," executed by the Niagra Falls Power Company and International Paper Company, dated September 27, 1905.

(5) Notice signed by International Paper Company, dated December 2, 1915.

Very truly yours,

F. L. LOVELACE,
Secretary.

XI. Subsequent to determination by the Council of National Defense that the manufacture of newsprint paper was a nonessential industry, and in view of the facts and circumstances surrounding the conditions at Niagara Falls and on December 28, 1917, the following, hereinafter referred to, respectively, as order, schedule, and temporary waiver, duly signed by the Secretary of War and the president of Niagara Falls Power Company, were mutually exchanged:

COUNCIL OF NATIONAL DEFENSE,
Washington, December 28, 1917.

TO NIAGARA FALLS POWER COMPANY,
Niagara Falls, N. Y.

SIRS: The President of the United States by virtue of and pursuant to the authority vested in him, and by reason of the exigencies of the national security and defense, hereby places an order with you for and hereby requisitions the total quantity and output of the electrical power which is capable of being produced and/or delivered by you through the use of all waters diverted or capable of being diverted through your intake canal and/or your plants and machinery connected therewith.

You are directed to make immediate and continuous delivery of such power until further notice. This order will be given precedence over any and all orders and contracts heretofore placed with you.

You will be paid fair and just compensation for power delivered hereunder.

Kindly acknowledge receipt hereof to the undersigned.

NEWTON D. BAKER,
Secretary of War.

RJB-F.

TEMPORARY WAIVER OF DELIVERY OF ELECTRICAL POWER OF NIAGARA FALLS POWER COMPANY

Whereas the President of the United States, by virtue of and pursuant to the authority vested in him, and by reason of the exigencies of the national security and defense has placed an order with Niagara Falls Power Company on the 28th day of December, 1917, and on the same date has requisitioned from it the total quantity and output of electrical power which is capable of being produced and/or delivered by said company through the use of all waters diverted or capable of being diverted through the intake canal of said Niagara Falls Power Company and/or the plants or machinery of said company connected therewith; and

Whereas said Niagara Falls Power Company has requested that it be permitted to carry on its business of production, importation, sale, and distribution of such power as is or may be developed, generated, or imported by it in whatever manner and to whatever extent may be deemed to be consistent with the exigencies of the national security and defense; and

Whereas in the judgment of the Secretary of War such exigencies will be provided for adequately for the time being if the electrical power hereby ordered and requisitioned from said company be sold by and for the account of said Niagara Falls Power Company and distributed by it in the manner shown in the attached schedule; and

Whereas said company has offered to waive all claim for compensation from the United States by reason of said order and requisition and/or the delivery of power under the conditions set forth in the schedule hereto attached, save as to such power as actually may be delivered to the United States:

Now therefore the Secretary of War, acting for and in behalf of the United States, hereby until further notice to said company, waives delivery to the United States of any of the power capable of being produced and/or delivered by said company, on the express condition that said company shall distribute such power as provided in the schedule hereto attached.

Upon request of the Secretary of War, or his duly authorized representative, said Niagara Falls Power Company shall furnish a sworn statement showing the users of said power during any specified period, together with the maximum quantity of power delivered daily and the rate of compensation charged to each user, and such other information as may be requested.

Said Niagara Falls Power Company hereby waives any and all right to compensation from the United States by reason of said requisition and order and/or delivery of said power under the conditions hereinbefore imposed.

In witness whereof this instrument has been executed in duplicate on the 28th day of December, 1917, on behalf of the United States by the Secretary of War and the said company has caused the same to be executed and its corporate seal attached by its president hereunto duly authorized.

NEWTON D. BAKER,
Secretary of War.
NIAGARA FALLS POWER COMPANY,
By ------------------------------
President.

SCHEDULE

The Niagara Falls Power Company shall deliver all electrical power, delivery of which is waived by the United States as provided in the waiver attached, under existing contracts, to the persons now entitled to receive such power, except that delivery of electrical power to the following consumers shall be curtailed as herein indicated:

"Hooker Electric Chemical Co. Reduced to 5,100 h. p.

"Niagara River Manufacturing Co. No power between hours of 6 a. m. and 7.30 p. m."

Said Niagara Falls Power Company shall use the additional power made available by increased use of water in its canal or by the curtailments herein prescribed or otherwise, to increase the amount of electrical power deliverable to the users named below—it being the intent hereof that they shall receive respectively and continuously the approximate amounts of electrical power set opposite their respective names.

"Carborundum Company, 13,500 h. p.

"Acheson Graphite Company, 7,000 h. p.

"Niagara Electro Chemical Company, 13,500 h. p."

The foregoing table is based upon the ability of said Niagara Falls Power Company to operate its plants and line at full capacity and efficiency.

Whenever said Niagara Falls Power Company shall have a surplus of electrical power above the requirements of its customers under the provisions of the foregoing waiver and this schedule it shall make distribution thereof to the customers on its lines in the following order of priority, viz:

"Star Electro Works.

"Acheson Graphite Co.

"Union Carbide Co.

"Oldbury Chemical Co.
"Niagara Electro Chemical Co.
"Carborundum Company.
"Phosphorus Compound Co.
"Mathieson Alkali Works, Inc.
"Hooker Electro Chemical Co.
"Niagara Alkali Co.
"Norton Company of New York.
"Aluminum Company of America.
"Buffalo General Electric Co."

In case of a deficiency in the supply of electrical power said Niagara Falls Power Company shall withdraw power first from consumers not named above and then from the several named customers in the inverse order of the foregoing list so far as the same may be done without undue damage to the plants and/or products of said several customers. There shall, however, be no curtailment of power deliverable to public utilities, or to small users employing an average of not to exceed 100 h. p. each until after all larger users shall have been curtailed as far as such curtailment may be effected without causing undue "damage."

XII. On December 29, 1917, Robert J. Bulkley, acting as the representative of the Secretary of War, wrote to Mr. Lovelace concerning the order which had been issued under date of December 28, 1917. This letter contained the following paragraph:

"Please note that the requisition order covers also all of the water capable of being diverted through your intake canal to such extent as it can be used on your machinery. This is intended to cut off the water being taken by the International Paper Company and thereby increase your productive capacity. Representatives of the International Paper Company were advised of this contemplated action some time ago and should by this time be prepared for the cut-off."

On December 31, 1917, Mr. Bulkley, acting as the representative of the Secretary of War, telegraphed F. B. Jennings, general counsel for the paper company, as follows:

"Power Company has been directed to take water hitherto used by International Paper Co. * * *."

XIII. On or about December 12, 1917, the local manager of the Niagara Falls mill of the International Paper Company was notified that the water which it was then taking from the power company's canal was to be shut off as soon

as the stock which was then in process of manufacture could be run out.

At the time the paper company was advised that it was to be deprived of the water which it had theretofore been taking, it had on hand at its Niagara Falls mill large stocks of unfinished paper, wood pulp, etc., which it was necessary to run out if needless waste was to be prevented. Mr. Bulkley, on behalf of the Secretary of War, agreed that the paper company might continue taking sufficient water from the canal of the power company to enable it to "run out" this stock on hand.

This was not accomplished until February 7, 1918. At 12.30 a. m., February 7, 1918, the paper company ceased using water from the power canal of the power company and thereafter did not resume the use of such water until midnight November 30, 1918, when the order of December 28, 1917, was abrogated.

Between February 7, 1918, and November 30, 1918, the order of December 28, 1917, remained in effect unmodified, and the schedule accompanying the same at no time permitted or authorized the power company to deliver any water to the paper company. During this entire period the power company took and used all the water diverted from the Niagara River through its power canal and refused to deliver and did not deliver any water to the paper company.

XIV. The paper company has never been paid any compensation by the United States or by any one else on account of the water and the water rights to which it was entitled under the aforesaid deeds and leases and of which it was deprived as aforesaid between February 7, 1918, and November 30, 1918, by the United States.

XV. During 1917 and 1918 there were no sales or leases of water or water power or water rights at Niagara Falls or its immediate vicinity other than that made by the power company to the paper company as aforesaid.

XVI. Prior to the shutdown of the Niagara Falls Mill in February, 1918, the daily capacity or normal average output of this mill was 154 tons of newsprint paper per day.

XVII. In the fall of 1917 and throughout 1918 there was available for use at the Niagara Falls Mill pulpwood and

other raw materials necessary for the operation of said mill throughout 1918 in the production of newsprint paper at the rate of 154 tons per day.

XVIII. In the fall of 1917 and throughout 1918 a sufficient supply of men was available for the operation of the Niagara Falls Mill throughout 1918 on the basis of an output of 154 tons of newsprint paper per day.

Prior to the shutdown in 1918 the paper mill employed approximately 500 men. After the shutdown only about ten men all told remained in the mill in order to look after the steam-boiler house, fire protection, and one foreman kept on the pay roll in order that he might be held. These ten employees acted in the nature of caretakers.

XIX. Throughout 1918 the demand for newsprint paper of the kind manufactured at the Niagara Falls Mill was greater than the paper company could supply, and the condition of the market for newsprint paper throughout 1918 was such that it would have absorbed the entire output of the Niagara Falls Mill during that period if that mill had been able to operate at its full capacity of 154 tons of newsprint paper per day.

XX. In the fall of 1917 and throughout 1918 prices for newsprint paper were rising. The sales prices of newsprint paper in carload lots during 1918 were as follows:

"January 1, through March 30, 1918—$60 per ton, f. o. b. mill.

"April, 1918—$70 per ton, f. o. b. mill.

"May 1, through June 30, 1918—$72.65 per ton, f. o. b. mill.

"July 1, through December 31, 1918—$75.05 per ton, f. o. b. mill."

XXI. In the fall of 1917 the paper company, in making contracts for the sale and delivery of newsprint paper during 1918, relied upon the expected 1918 output of the Niagara Falls Mill of 154 tons of newsprint paper per day. Because of the shutdown of the Niagara Falls Mill, the paper company requested certain of its contract customers to cut down on their contract commitments.

Some of them complied with this request and the company was able to and did satisfy, from other plants operated by it, the commitments remaining.

XXII. Between February 7, 1918, and December 1, 1918, the Niagara Falls Mill of the paper company sustained an actual out-of-pocket or direct overhead expense of $304,685.26 on account of the shutdown. This loss would not have been sustained if the mill had been able to operate during the period of the shutdown. It does not satisfactorily appear what loss of profits, if any, the plaintiff sustained by reason of its plant being closed during a portion of the year 1918.

XXIII. At all times between November 1, 1917, and January 1, 1919, the demand for power at Niagara Falls far exceeded the available supply. During this period the standard price for electric energy supplied by the Niagara Falls Power Company in the city of Niagara Falls, not in renewal of preexisting contracts, was at the rate of $20 per horsepower per annum. Between February 7, 1918, and November 30, 1918, large consumers of electrical power at Niagara Falls purchased and used blocks of power ranging from 1,600 horsepower to 14,000 horsepower and paid for such power at a rate varying between $33 and $47.05 per horsepower per annum. Any additional power which might have been available at Niagara Falls between February 7, 1918, and November 30, 1918, would have commanded a price of not less than $47.05 per horsepower per annum.

The court decided that plaintiff was not entitled to recover.

GRAHAM, *Judge*, delivered the opinion of the court:

The plaintiff is claiming damages as just compensation for the taking of its property by the defendant for public use. The alleged taking, stating it in a general way, is the action of the defendant in preventing it from getting water to generate its power for its plant from the canal of the Niagara Falls Power Company under leases and claimed rights from the latter company. The defendant defends upon the grounds:

(1) (a) That there was no taking of the plaintiff's property;

(b) That the water and its consequent power, if taken, were not private property, but were under the control of the United States Government;

(c) That if it was taken, it was not for a public use, that the United States did not use it, and it was distributed to private industries which were aiding in the prosecution of the war;

(2) That if the plaintiff was damaged the damage was consequential, under the *Omnia Commercial Co. case*, 261 U. S. 502, and its injury was incidental to the exercise of sovereign power, as the Government, if it requisitioned, requisitioned only the product of the Niagara Falls Power Company;

(3) That the use of the water in the Niagara River for power purposes is controlled by stipulation in a treaty between the United States and Great Britain ratified May 5, 1910, prior to the action herein complained of, and that the plaintiff is barred under section 153 of the Judicial Code;

(4) That whatever was secured by the Government from the Niagara Falls Power Company was secured by reason of a contract with that company wherein it waived all claim for damages by reason of any requisition proceedings and consented to deliver its power to private individuals as directed in the agreement, and that if the plaintiff has any right of action it is against the Niagara Falls Power Company by reason of this contract;

(5) That under this contract, if the Government exercised any right, it was merely the right to direct how the power of the Niagara Falls Power Company should be used, and to what individual manufacturers it should be distributed in connection with and to promote the prosecution of the war and the national defense; and

(6) That if there was a taking it was under a claim of right.

The plaintiff owned a plant for the manufacture of paper, located above and near the falls of the Niagara River, which was operated by water power. This power was secured through an intake opening on a canal con-

structed above the Falls and owned and operated at the time by another corporation, the Niagara Falls Power Company. The plaintiff's property did not abut on this canal and was separated from it by a street. The water was passed through an intake from the canal to and down a chute extending some distance below its level to machinery which was propelled by the force of its fall, and the water carried out through a small runway into the main runway of the Niagara Falls Power Company, and from there to the river below the Falls. It had secured the right to use the water from the canal by a contract with the Niagara Falls Power Company, which allowed it to take sufficient water to generate a certain number of units of power.

The Niagara Falls Power Company, prior to the execution of said contract, had constructed a canal in the nature of a *cul de sac* on its own land, and connected with the waters of the Niagara River above the Falls, and in such a way that the water ran into this canal up to the level of the river. Near the end of the canal it had constructed a chute which carried the water some distance below the surface, and as in the case of the International Paper Company it turned machinery which generated power. It had also its own underground runway above mentioned, which carried this water off and into the river below the Falls. Its business was producing power and selling it for manufacturing, lighting, and other purposes. It did not manufacture anything but power. Its product was power.

The Niagara Falls Power Company was using the water which passed into its canal under a license from the United States granted by the Secretary of War by virtue of the authority given him under the act of June 29, 1906, 34 Stat. 626, known as the Burton Act. This license limited said company to the use of water sufficient to produce a certain number of units of power. The license was revocable at the will of the Government and discretion of the Secretary of War.

The Niagara River was in the nature of an international boundary between the United States and Canada, and under a treaty of May, 1910, between the United States and Great

Britain, was open to the joint and unrestricted use for navigation and all necessary control of navigation as might be determined by joint action. And under treaty, also, between these countries a limit was placed on the amounts of water that could be taken by each of them from the Niagara River for the production of power; that is, each was allowed to use water up to certain units of power. So that this treaty, as was intended, placed the control of the water of the river for power purposes under the control of the two governments, and, being a treaty, it is part of the supreme law of the land. We have, then, the Government of the United States, by treaty, obligated to limit on its side the amount of water to be taken from the Niagara River for power purposes and assuming control. But, aside from the treaty, as between the States and its citizens the Government had the right to control the use of power and the building of dams and structures necessary to generate power in the navigable waters of the United States, of which the Niagara River was a part. Congress on June 10, 1920, 41 Stat. 1063, passed the Federal Power Commission act, sometimes designated as the water power act, which imposed penalties for its violation and appointed a commission to control and pass upon permits. The right embodied in and exercised by this statute was based upon the authority of Congress to preserve the navigability of waters of the United States, including those open to foreign commerce. The constitutional power of Congress to exercise this right was fully discussed and considered by Congress during and prior to the passage of the act. In view of this conclusion of Congress as to its constitutional right to control water for power, this court will not undertake to say that it has not the power therein asserted and exercised.

We further see that the Niagara Falls Power Company was securing water for its canal under a revocable license under the Burton Act, *supra*. Had the license been revoked, as it could have been at any time, its ability to produce its power would have ended, and the right to use the water in the canal would have terminated, as would the plaintiff's right as its lessee. The plaintiff had no right to use or connect with the water in said canal of the Niagara Falls

Power Company except by contract with that company, and the right which was granted under the contract would give the plaintiff no higher rights than were possessed by the power company. And had the United States revoked the permit of the power company, which would have in effect canceled the contract of the plaintiff with that company, it is plain that the plaintiff could have had no action either against that company or the Government which canceled the license.

The Council of National Defense, under authority of the act of August 29, 1916, chap. 418, 39 Stat. 649, was granted authority to make recommendations to the President and heads of departments, among other things, as to the "utilization of waterways, the increase of domestic production of articles and materials essential to the support of the Armies and of the people during the interruption of foreign commerce." Prior to the issue of the so-called commandeering order by the Secretary of War, hereinafter mentioned, the Council of National Defense had held that the production of print paper was not an essential industry to the support of the Army and the conduct of war, and at the time of the issuance of the order much of the power produced by the Niagara Falls Power Company was being used for this purpose, and for the same purpose power secured from Canada was being used, and the Canadian Government had suggested that this latter power was not being used to operate industries which aided in the prosecution of the war.

Thereupon the Secretary of War, by authority of the President, on December 28, 1917, issued an order to the Niagara Falls Power Company, which stated that the President "hereby requisitions the total quantity and output of the electrical power which is capable of being produced or delivered by you through the use of all waters diverted or capable of being diverted through your intake canal or your plants and machinery connected therewith. You are directed to make immediate and continuous use of such power until further notice." With this order was filed what was called a temporary "waiver" or contract by the Niagara Falls Power Company which was the result of prior negotiations. It recited the requisition just mentioned, and, fur-

ther, "that the Niagara Falls Power Company had requested to be permitted to carry on its business of production, importation, sale, and distribution of such power" as it could develop consistent with the exigencies of national security and defense, and that the Secretary of War felt that such exigencies would be provided for if the power company would distribute all the power which it was capable of producing in the manner indicated in an attached schedule, which schedule gave the names of certain plants to which power was to be distributed and furnished. The plaintiff's name was not among those named and by virtue of this agreement between the Secretary of War and the power company it would be cut off and was cut off from taking water for its power plant under its contract with the power company, as the latter was to use all the water that the Government under the license allowed to be taken.

This waiver or, rather, contract, for contract it was, further recited that the Niagara Falls Power Company had offered to waive all claims for compensation from the United States by reason of said order and requisition, and it agreed to deliver the power under the conditions set forth in said schedule. The contract provided that in view of the facts recited the United States Government waived delivery, until further notice, to the United States of any power upon condition that it be distributed to the parties named in the schedule, and the power company waived any and all right to compensation from the United States by reason of said requisition order, or the delivery of power under the conditions named in this contract.

It will be seen that the Niagara Falls Power Company, without the permit from the Government, or in case of the cancellation of the permit, would be operating illegally and the rights of the plaintiff against the United States could not be better or other than those of the Niagara Falls Power Company. Instead of cancelling the permit of the power company by not including the plaintiff in the schedule, the permit which the plaintiff had secured by its contract with that company was frustrated. If the Government had the right to cancel as to the Niagara Falls Power Company, it had the right to cancel as to plaintiff. Whatever the action

which it took may be called, it proceeded under a claim of right. *Tempel* v. *United States*, 248 U. S. 121; *Ball Engineering Co.* v. *White & Co.*, 250 U. S. 46, 57; and *Natron Soda Company case*, 257 U. S. 138. It follows also in this connection that if the Government assumed control of, or was obligated to control, the use of water from the Niagara River for power purposes under the aforesaid treaty with Great Britain, it had this right of control under the Constitution and was exercising it by virtue of the aforesaid Federal Power Commission Act (June 10, 1920).

But, aside from this view of the matter, if the foregoing considerations were not in the case, the plaintiff could not recover, (1) because it was deprived of its contract with the Niagara Falls Power Co. by a contract which the latter company voluntarily entered into with the United States, and if it had any right of action it would be against that company; (2) what the Government took by the requisition order, if it took anything, was the *product* of the Niagara Falls Power Company. It did not take its plant or the use of it. It did not take its canal. It took what power it could produce and was producing from the entire plant; that is, as stated, it took the product of the plant, not the plant.

By reason of the alleged taking, the contract to furnish so much water to the plaintiff was frustrated, not taken. The situation, as far as the principle involved is concerned, is the same as in the *Omnia Commercial Co. case*, 261 U. S. 502, 511. The damage to the plaintiff was incidental. The Government did not take plaintiff's plant or its contract with the Niagara Falls Power Company, nor did it intend to take it.

In this case the Government, if it took anything, did not take the res, as it was held in the *Duckett case*, 266 U. S. 149, that it did. There it took over the whole terminal plant and the plaintiff was the lessee of a portion of it, and it was held that the taking over of the res took his lease, which was a part of the res, but in the case at bar the Government did not take the res, it did not take over the plant or its operation or its use. It simply commandeered the output or product of the plant, that is, such power as the plant under the conduct and management of the company was able to turn out, and this is as close to what was done in the *Omnia Com-*

mercial case, supra, as we could well have it without having the identical facts. In that case plaintiff had a contract antedating the taking, under which the company was to furnish it so many tons of steel at a given price for which it had already paid. The court held that the contract was not taken, but frustrated, and that it was an incidental loss for which there was no recovery, a loss incident to the legitimate exercise of a sovereign right by the Government.

But, further, by the subsequent contract with the Niagara Falls Power Company by which the plaintiff was deprived of its rights, the Government did not even appropriate or receive the product, as in eminent domain, of the Niagara Falls Power Company for public use, but, on the contrary, it was furnished to and received by those corporations named in said schedule, with the consent of said company. It controlled the distribution of the product under a contract with that company, in which contract that company expressly waived all claims for damage, if any there were, by reason of the previous requisition to which this contract was the successor. The Government did not take the property of the Niagara Falls Power Company without its consent, but, on the contrary, with its consent, and if there was no taking as to the Niagara Falls Power Company, it is very plain that there would be none as far as the plaintiff is concerned.

In 1902 an international waterways commission, composed of three representatives of the United States and three representatives of the Dominion of Canada, was created, 32 Stat. 373, which recommended that the amount of water to be taken on the American side from the Niagara River above the Falls should be limited to 18,500 cubic feet per second. Thereafter Congress asserted its constitutional right to control water of navigable streams within the control of the United States. On June 29, 1906, it passed what was known as the Burton Act, 34 Stat. 626, which authorized the Secretary of War to grant permits for the diversion of 15,600 cubic feet per second from the Niagara River. The Niagara Falls Power Company applied for and was granted revocable licenses beginning August 16, 1907, and from time to time they were renewed by joint resolutions

of Congress. Under date of January 19, 1917, a license revocable at the will of the Secretary of War was granted, and on July 1, 1918, a further revocable license was granted authorizing the diversion by the Niagara Falls Power Co. and the Hydraulic Power Co., a subsidiary of said company, of practically 97½% of the amount of power allotted to the United States under the said treaty, and thereafter, on July 30, 1919, another revocable permit or license was granted the said Niagara Falls Power Co. for not exceeding 19,500 cubic feet, being the aggregate of what had hitherto been allowed to that company and the said Hydraulic Power Co.

In 1920 Congress passed the water power act, *supra*, asserting control of the use of water in navigable waters for water power.

If the United States Government in entering into the treaty of May, 1910, with the British Government, by which it undertook to control and limit the use of the Niagara River for water power, was within the limits of its constitutional power, and if aside from this treaty, which is the supreme law of the land, Congress had constitutional power and had exercised it by the Burton Act and Federal Power Commission Act, *supra*, to control and limit the use of said waters for said power purposes, then the contention of the plaintiff that it had a vested right under sundry conveyances and the law and decisions of the courts of New York to take and use water from the Niagara River can not be sustained; and it would be extending this opinion beyond necessary limits to discuss these rights. Suffice it to say that whatever these rights may be under the law and decisions of New York, and the conveyances of title to plaintiff, we do not think that they can be asserted or are or can be of avail against the conclusion which we have reached as to the controlling effect, as far as this case is concerned, of the said treaty with Great Britain and action of Congress in exercising its power to control said waters.

To sum up our conclusions: The Government did not, and did not intend to, take the plaintiff's property. If it be held that it took the property of the Niagara Falls Power Company, the loss of the plaintiff was incidental to the

exercise of a sovereign right. By the contract with the Niagara Falls Power Company the Government secured the distribution of the power of that company to individuals in aid of the prosecution of the war. If it be held that it did take the property of the Niagara Falls Power Company, it took it under a claim of right by virtue of the authority of the Constitution and the said acts of Congress giving it control of water power. It did not take control of the product and output of the Niagara Falls Power Company without its consent, but, on the contrary, with and by its consent, by contract, and not for the public use of the United States in its corporate capacity but for the use of certain citizens thereof in the aid of national security and defense.

Inasmuch as we hold that there was no taking, it is not necessary to pass upon the question whether the Lever Act applies or not and whether this court has jurisdiction.

The petition should be dismissed, and it is so ordered.

GREEN, *Judge*, and BOOTH, *Chief Justice*, concur.

W. L. FAIN GRAIN CO. v. THE UNITED STATES

[No. H-269. Decided November 4, 1929]

On the Proofs

Contracts for oats; breach; neglect to give orders for delivery; measure of damages; commission on sale.—Plaintiff had agreed to deliver to defendant a designated quantity of oats at Camp Jackson, South Carolina, and bought of grain dealers sufficient to fulfill the contract deliverable at any time that the same were called for by the Government. Although repeated requests were made for orders the defendant, after accepting a part of the agreed amount, advised the plaintiff that no more oats would be required, as troops were being withdrawn from Camp Jackson. The Government did not at any time cancel the contract and plaintiff sold the uncalled-for balance at market price, which was lower than the contract price, and was required to pay commission on the sale thus made. *Held*, that plaintiff was entitled to recover as for a breach the difference between market and contract prices on the uncalled-for balance, plus the commission.

Counterclaims; proof.—Statements of accounts, as shown in the Government's books, records, or files, by themselves and alone, are inadequate as proof of a counterclaim. The Government is not exempt from the rules of evidence that apply to other litigants.

The Reporter's statement of the case:

King & King for the plaintiff.

Mr. John E. Hoover, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff, W. L. Fain Grain Company, is now, and was during all of the times hereinafter mentioned, a corporation organized under the laws of the State of Georgia, with its principal office and place of business at Atlanta, Georgia. Plaintiff was during the times hereinafter mentioned, and is now, engaged in the business of buying and selling grain, stock feed, and field seeds, wholesale.

II. Under date of July 25, 1921, plaintiff corporation entered into a contract with the United States, represented by Captain T. L. Holland, Q. M. C., United States Army, as contracting officer, by the terms of which plaintiff obligated itself to furnish and deliver, f. o. b. shipping points as therein specified, among other things, 1,200,000 pounds of No. 3 white oats at and for the price of $0.01184 per pound, to be delivered at Camp Jackson, South Carolina. A true copy of said contract is filed with and made a part of the petition herein, marked "Exhibit A," and is made a part of this finding by reference.

III. The contract in question was let as a result of public bids opened on or about June 14, 1921. Plaintiff was the lowest and best bidder, and immediately following the opening of the bids plaintiff was assured that an award would be made and a formal contract entered into as soon as funds were made available. On June 29, 1921, the same being fifteen days after the bids were opened and before the formal contract was executed, plaintiff bought through the Chicago market from the firm of Bridge & Leonard, grain dealers in Chicago, a supply of oats sufficient to fill the con-

tract. At this time the market price of oats was less than it was on July 25, at the time the contract was executed. On July 25 plaintiff was notified that a contract for the sale and purchase of the oats mentioned therein would be forwarded to plaintiff for signature, which was done immediately thereafter. The contract had in it a clause giving the Government the right to reduce quantities in case it was found necessary to remove the troops from any post. Plaintiff objected to that clause in the contract and returned the same to the Government officials unsigned. The contract was returned to plaintiff with that clause deleted, and it was signed by plaintiff immediately thereafter, bearing date of July 25, 1921.

IV. Plaintiff never at any time received orders for shipments of oats to Camp Jackson, but without orders it shipped two cars aggregating 251,680 pounds of oats, which were after some delay accepted by the Government and paid for. Plaintiff made many and urgent requests for orders for shipment of the balance of the contract quantity, amounting to 948,320 pounds, but no orders were received, and on August 19, 1921, plaintiff was advised that no more oats would be required for Camp Jackson, as troops were being withdrawn from that post. No formal notice in writing of the cancellation of the contract was given plaintiff. Frequent protests against the failure of the United States to order and accept the balance of oats called for in the contract were made by plaintiff. Immediately thereafter plaintiff sold the remainder of the oats at and for the price of 27½ cents per bushel, 32 pounds to the bushel, the same being the market price of oats of that grade on August 20, 1921, the time that plaintiff sold the same. The difference between the market or sale price of the oats and the contract price is $3,078.48. The plaintiff paid $148.17 as commission charges on the sale of the oats which was a necessary expense in the sale thereof.

V. Plaintiff never at any time had a sufficient quantity of oats on hand to fulfill the contract, and did not have physical possession of the oats that it bought of Bridge & Leonard for the fulfillment of the contract, but under the contract that plaintiff had with Bridge & Leonard the oats would

have been delivered at any time that the same were called for by the Government. Plaintiff was at all times ready, able, and willing to perform its contract and deliver the oats to the Government if the same had been called for.

VI. During previous years plaintiff had numerous contracts with the Quartermaster's Department, United States Army, for the supply of forage for various posts and Army stations in the South, and in all cases was paid what was thought and intended to be the full contract price. As a result of the audit made by representatives of the finance department in 1926 the Government asserts by way of counterclaim that there is due the Government from the plaintiff the sum of $3,429.32, the same representing various overpayments made to plaintiff under its previous contracts with the Government.

There is due the Government the sum of $585.12 under contract No. 150, as alleged in paragraph A of the counterclaim.

There is due the Government from the plaintiff the sum of $344.71 under contract No. 1783, as alleged in paragraph B of the counterclaim.

There is due the Government from the plaintiff the sum of $11.88 under contract No. 1943, as alleged in paragraph D of the counterclaim.

There is due the Government from the plaintiff the sum of $342.64, under contract No. 117, as alleged in paragraph G of the counterclaim.

There is due the Government from the plaintiff the sum of $1,380.00, under contract No. 66, as alleged in paragraph I of the counterclaim, making a total due the Government on the counterclaim of $2,664.35.

VII. Overpayments to plaintiff in the sum of $575.10 as alleged in paragraphs C, E, F, H, and J of defendant's counterclaim have not been proved.

The court decided that plaintiff was entitled to recover $562.30.

GREEN, *Judge*, delivered the opinion of the court:

The findings show that the plaintiff sold defendant a large quantity of oats to be furnished to the defendant upon notice. Part of the oats was shipped and accepted by de-

Syllabus

fendant and defendant then notified plaintiff that it would not receive any more. Immediately thereafter the plaintiff sold the remainder of the oats at the market price. The measure of plaintiff's damages is the difference between the market price and the contract price on the oats which defendant declined to accept, together with the necessary expenses of the sale. The contract price was $3,078.48 more than the market price, and the plaintiff paid $148.17 commission on the sale, making a total amount of damages sustained by reason of breach of the contract $3,226.65. On the several items of the defendant's counterclaim, as shown by Finding VI, the defendant is entitled to recover a total of $2,664.35. The remainder of defendant's counterclaim is not proved and in this connection perhaps counsel ought to be reminded that statements of accounts, as shown in the Government's books, records, or files, by themselves and alone, are inadequate. The Government is not exempt from the rules of evidence that apply to other litigants. Deducting the amount allowed on the counterclaim from the amount of damages sustained by plaintiff by reason of the breach of contract, we have $562.30 for which the plaintiff is entitled to judgment.

The plaintiff and defendant in argument seem to disagree as to the rule of law which should be applied in measuring the damages. In fact, the result would be the same whichever way the damages are computed, and the cases cited by the respective attorneys, while seeming to be in conflict, are in reality harmonious. The defendant's calculations do not include the cost of selling the oats and the plaintiff's calculations apparently have a slight mathematical error.

GRAHAM, *Judge*, and BOOTH, *Chief Justice*, concur.

SAM SANOFF v. THE UNITED STATES

[No. F-326. Decided November 4, 1929]

On the Proofs

Army pay; enlistment allowance; discharge by purchase.—A private in the Army who having enlisted April 24, 1917, and been honorably discharged April 9, 1919, again enlists December 22, 1920.

Reporter's Statement of the Case

has on the latter date, having had less than three years' service, bound himself under an "original" enlistment within the meaning of the act of June 4, 1920. The enlistment allowance to which he was entitled under the act of June 4, 1920, upon honorable discharge was, under paragraphs (b) and (d) of Circular No. 201, War Department, July 29, 1921, included in the purchase price of his honorable discharge March 14, 1922.

The Reporter's statement of the case:

Mr. Benjamin B. Pettus for the plaintiff.

Mr. M. C. Masterson, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. Sam Sanoff, hereinafter referred to as the plaintiff, is a citizen of the United States, now residing in the District of Columbia.

II. The plaintiff, a recruit, Company I, Third Infantry, Missouri National Guard, which became Company I, One hundred and fortieth Infantry, enlisted April 24, 1917, at Kansas City, Missouri, and reported the same day at the company rendezvous under the call of the President. He was transferred November 10, 1917, to the Quartermaster Corps, was appointed a private, first class, January 19, 1918, was transferred to the Conservation and Reclamation Division, Q. M. C., Fort Sill, Oklahoma, September 1, 1918, was appointed a corporal October 29, 1918, and was honorably discharged from the service April 9, 1919, at Camp Funston, Kansas.

III. On December 22, 1920, plaintiff again enlisted in the United States Army, at Washington, D. C., served in the Hawaiian Department from February 4, 1921, to March 9, 1922, and was honorably discharged from the service March 14, 1922, at Fort McDowell, California, by purchase, a private, Headquarters Company, Second Battalion, Twenty-first Infantry.

IV. The final statement of his account as shown from a transcript of the official roll at the time of his discharge on March 14, 1922, is as follows:

Memorandum by the Court

Credits

Pay as private (Inf.) from Feb. 1 to Mar. 14, 1922—1 month and 14 days, at $30 per month	$44.00
Pay as marksman at $2.00 per month	2.93
Deposits	110.00
Clothing (due soldier)	15.27
	172.20

Debits

Purchase price of discharge	$110.00
Due United States for clothing	1.52
Amount due and paid	60.68
	172.20

V. Plaintiff filed claim with the General Accounting Office, War Department Division, for $90.00 enlistment allowance, under the provisions of the act of June 4, 1920 (41 Stat. 775), and his said claim was disallowed in settlement No. C–026963, April 30, 1924. He then requested a reconsideration of this action by the Comptroller General, who, upon review, affirmed the action of the War Department Division. (Appeal No. A–12869, August 6, 1926.) No part of the said $90.00 claim has been paid to the plaintiff.

The court decided that plaintiff was not entitled to recover.

MEMORANDUM BY THE COURT

The act of June 4, 1920 (41 Stat. 775), provides as follows:

"SEC. 27. *Enlistments.*—Hereafter original enlistments in the Regular Army shall be for a period of one or three years at the option of the soldier, and reenlistments shall be for a period of three years. Existing laws providing for the payment of three months' pay to certain soldiers upon reenlistment are hereby repealed, and hereafter an enlistment allowance equal to three times the monthly pay of a soldier of the seventh grade shall be paid to every soldier who enlists or reenlists for a period of three years, payment of the enlistment allowance for original enlistment to be deferred until honorable discharge."

Memorandum by the Court

What constitutes an enlistment and reenlistment within the purview of the act of June 4, 1920 (*supra*), was before the Comptroller of the Treasury in July, 1920 (27 Comp. Dec. 40). The comptroller in his opinion discussed the issue exhaustively, and held adversely to the contention of the plaintiff herein. An identical contention, as herein advanced, was before the Judge Advocate General of the Army, and his ruling is cited in the opinion of the comptroller hereinbefore cited. The court is convinced of the correctness of the above opinions, supplemented by recent opinion of the Comptroller General on August 6, 1926, as follows:

Mr. SAM SANOFF,
% Colladay, Clifford and Pettus,
Union Trust Building, Washington, D. C.

SIR: There is for consideration your request for a review of settlement No. C–026963–M, dated April 30, 1924, by which was disallowed your claim for the enlistment allowance of $90 under section 27 of the national defense act, as amended by the act of June 4, 1920, 41 Stat. 775, upon your discharge by purchase March 14, 1922.

The act provides as follows:

"SEC. 27. *Enlistments*.—Hereafter original enlistments in the Regular Army shall be for a period of one or three years at the option of the soldier, and reenlistments shall be for a period of three years. Existing laws providing for the payment of three months' pay to certain soldiers upon reenlistment are hereby repealed, and hereafter an enlistment allowance equal to three times the monthly pay of a soldier of the seventh grade shall be paid to every soldier who enlists or reenlists for a period of three years, payment of the enlistment allowance for original enlistment to be deferred until honorable discharge."

The records show that you enlisted April 24, 1917, and were honorably discharged April 9, 1919; that you enlisted again December 22, 1920, for three years, and were honorably discharged by purchase March 14, 1922.

Having had less than three years' service prior to December 22, 1920, your enlistment on that date constituted an "original enlistment" within the meaning of the act of June 4, 1920, 27 Comp. Dec. 40; 1 Comp. Gen. 362. It was held in 1 Comp. Gen. 1, that the provisions of the act of June 30, 1921, abolishing the enlistment allowance provided by the act of June 4, 1920, did not apply to those men who enlisted in the service during the period June 4, 1920, to June 29, 1921, for a term of three years.

Syllabus

Section 4 of the act of June 16, 1890, 26 Stat. 158, provides that in time of peace the President may in his discretion and under such rules and conditions as he shall prescribe, permit any enlisted man to purchase his discharge from the Army.

Paragraph 1–a, Circular No. 201, War Department, July 29, 1921, provides that in time of peace, except as otherwise provided, any enlisted man who has completed one year's service as such and is not undergoing punishment or under charges, may obtain the privilege of purchasing his discharge, subject to approval. Paragraph b fixed the purchase price and by paragraph d it was provided—

"d. A soldier serving in an original enlistment of three years and discharged by purchase, is not entitled to the enlistment allowance of three times the monthly pay of a soldier of the seventh grade, authorized up to June 30, 1921, by section 27, national defense act, as amended by the act of Congress approved June 4, 1920, and notation to that effect will be entered on the final statement by the officer preparing the final statement."

The purpose and intent of this paragraph is to make any right the man might have to an enlistment allowance on discharge from an original enlistment a part of the purchase price of his discharge.

The settlement is sustained.

Respectfully,

(Signed) J. R. McCARL,
Comptroller General of the United States.

The petition is dismissed. It is so ordered.

STEWART-WARNER SPEEDOMETER CORP. v. THE UNITED STATES

[No. J–113. Decided November 4, 1929]

On the Proofs

Excise taxes; automobile parts or accessories; vacuum tanks, electric and hand-operated signals, searchlights.—Vacuum tanks, electric and hand-operated signals, and searchlights, manufactured and sold by plaintiff, primarily designed and specially adapted

for use upon automobiles or trucks, advertised as such and sold for that purpose, *held* to be parts or accessories for automobiles or trucks and subject to excise taxes accordingly.

The Reporter's statement of the case:

Mr. George M. Wilmeth for the plaintiff.

Mr. Ralph C. Williamson, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. Arthur J. Iles* was on the brief.

The court made special findings of fact, as follows:

I. The plaintiff, Stewart-Warner Speedometer Corporation, was, during the period in question in this case, engaged in the business of manufacturing and selling vacuum tanks, electric and hand-operated signals, and searchlights used on automobiles and trucks.

A vacuum tank is a device sometimes used on tractors, marine engines, oil burners, and internal-combustion engines other than those used for propelling automobiles and trucks. The electric signals made by plaintiff are instruments which give signals by sound when a switch is pressed, and are sometimes used on motor boats and in factories as call signals. The hand-operated signal differs from the electric by being operated by hand. It is sometimes used upon hauling machines and tractors.

Searchlights are used to throw a light on a desired spot and can be used wherever such a result is desired.

During the period in question, the plaintiff sold certain quantities of each of the articles mentioned for purposes other than use in connection with the operation of an automobile or truck, but no taxes were paid on such sales. The sales upon which a tax was paid were of the articles listed above, but only where they were primarily designed and specially adapted for use upon automobiles or trucks, advertised as such, and sold for that purpose.

II. Plaintiff made and filed its manufacturer's excise-tax returns monthly for the period July, 1922, to February, 1926, inclusive, showing the amount of tax due thereon which was duly assessed on such returns by the Commissioner of In-

ternal Revenue, paid by plaintiff for the months, in the amounts, and on the dates hereinafter set forth, as follows:

Period	Year	Month	Year	Page	Line	Amount	Date paid
July	1922	Sept	1922	11	6	$13,169.03	9/1/22
Aug		Oct		5	6	18,963.57	10/2/22
Sept		Nov		10	3	9,367.90	11/1/22
Oct		Dec		14	3	9,287.70	12/1/22
Nov		Jan	1923	3	7	22,091.41	1/2/23
Dec		Feb		22	2	20,119.16	2/1/23
Jan	1923	Mar		26	0	5,090.05	3/1/23
Jan		Apr		4	4	518.31	4/2/23
Feb		Apr		4	5	10,689.96	4/2/23
Mar		May		10	2	20,324.73	5/1/23
Apr		June		9	1	25,822.60	6/1/23
May		July		5	9	24,564.71	7/2/23
June		Aug		11	2	24,878.62	8/2/23
July		Sept		4	0	20,108.93	9/1/23
Aug		Oct		8	3	15,253.45	10/1/23
Sept		Nov		14	1	15,581.10	11/1/23
Oct		Dec		12	1	11,375.48	12/3/23
Nov		Jan	1924	5	9	28,657.73	1/2/24
Dec		Feb		6	7	19,629.03	2/1/24
Jan	1924	Mar		5	8	4,162.09	3/1/24
Feb		Apr		21	7	8,634.04	4/1/24
Mar		May		11	2	30,443.91	5/2/24
Apr		May		156	6	9,500.71	5/31/24
May		July		7	8	16,891.20	7/1/24
June		Aug		5	3	13,377.97	8/1/24
July		Sept		1	7	6,482.78	9/2/24
Aug		Oct		6	5	6,408.89	10/1/24
Sept		Nov		2	0	6,471.89	11/1/24
Oct		Dec		3	8	9,032.10	12/3/24
Nov		Jan	1925	1	7	5,492.48	1/2/25
Dec		Feb		0	8	9,308.39	2/2/25
Jan	1925	Mar		1	1	1,315.84	3/2/25
Feb		Apr		3	1	2,099.33	4/1/25
Mar		May		2	5	4,780.90	5/1/25
Apr		June		16	7	6,538.11	6/2/25
May		July		11	7	7,420.59	7/1/25
June		Aug		1	9	7,732.46	8/1/25
July		Sept		7	5	4,549.78	9/1/25
Aug		Oct		4	9	4,642.31	10/1/25
Sept		Nov		11	8	3,506.97	11/3/25
Oct		Dec		8	5	4,093.70	12/1/25
Nov		Jan	1926	7	2	4,117.80	1/4/26
Dec		Feb		8	6	4,245.57	2/2/26
Jan	1926	Mar		7	1	1,512.59	3/2/26
Feb		Apr		2	6	2,546.81	4/1/26

On August 30, 1926, plaintiff filed its claim for refund #355334 of manufacturer's excise tax so paid on vacuum tanks, electric and hand-operated signals and searchlights, for the period July, 1922, to February, 1926, inclusive, in the amount of $35,325.55, which was duly rejected by the Commissioner of Internal Revenue on May 5, 1927.

The court decided that plaintiff was not entitled to recover.

MEMORANDUM BY THE COURT

The sales which were taxed in this case were of articles primarily designed and specially adapted for use in connec-

tion with automobiles and advertised and sold as such. They were sometimes sold and used for other purposes, but when so sold no tax was paid. Under repeated decisions of this court, the taxes paid were properly assessed and collected. It follows that the petition of plaintiff must be dismissed, and it is so ordered.

JOHN W. GARRETT v. THE UNITED STATES

[No. J-557. Decided December 2, 1929]

On the Proofs

Leases; Veterans' Bureau; removal of structures at expiration of lease; failure to remove foundations.—The plaintiff having leased certain premises to the Veterans' Bureau with provision for removal by lessee at expiration of lease of all structures placed by it thereon and for restoration of the premises by lessee to the same condition as when leased, ordinary wear and tear excepted, it was *held* that plaintiff was entitled to recover the expense of removing the foundations, the same having been left after removal of the superstructure.

The Reporter's statement of the case:

Mr. Dean G. Atkinson for the plaintiff. *Covington, Burling & Rublee* were on the brief.

Mr. Heber H. Rice, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. On November 24, 1917, the plaintiff, being the owner of certain real property known as Kernewood, situated in the city of Baltimore, Maryland, and also certain other real property adjoining the same together with Alice W. Garrett, his mother, and Robert Garrett, his brother, being the owners as tenants in common, executed a written lease to the United States of said premises. Subsequently, the plaintiff, and the said Alice W. Garrett and Robert Garrett, leased to the United States certain additional adjoining property for a term extending to June 30, 1918. Both of

said leases gave the lessee the right of renewal from year to year. The lease of November 24, 1917, provided, among other things, as follows:

"The lessor agrees to permit the lessee to put such additional buildings, recreation grounds, etc., as may be required on the property at the expense of said lessee. The lessee agrees upon the termination of the lease to turn over the property in as good condition as received, ordinary wear and tear excepted.

* * * * * * *

"3. * * * all buildings and other improvements fixed to or erected or placed in or upon the said premises by the lessee shall be and remain the exclusive property of the lessee, provided, however, that the same, unless sold or otherwise disposed of, shall be removed by the lessee within sixty days after the said premises are vacated under this lease."

The lease of January 15, 1918, provided, among other things, as follows:

"Any and all improvements to the aforementioned leased property shall be at the expense of the lessee; and the lessee agrees to return the property to the lessor at the expiration of this lease, or any renewal thereof, in as good condition as received.

"3. All buildings and other improvements fixed to or erected or placed in or upon the said premises by the lessee shall be and remain the exclusive property of the lessee, provided, however, that the same, unless sold or otherwise disposed of, shall be removed by the lessee within sixty days after the said premises are vacated under this lease."

II. The United States renewed the said leases of November 24, 1917, and January 15, 1918, from year to year and retained possession of the said premises under the said leases during the fiscal years ending June 30, 1919, June 30, 1920, and June 30, 1921. Prior to June 30, 1921, the plaintiff and Robert Garrett, his brother, became the owners as tenants in common of the property leased by the said leases of November 24, 1917, and January 15, 1918, with the exception of the property known as Kernewood, which is the subject matter of this suit and which remained the sole property of the plaintiff.

III. On June 30, 1921, the United States surrendered to the plaintiff and said Robert Garrett the property leased

under the leases of November 24, 1917, and January 15, 1918, except the said twenty-seven (27) acres known as Kernewood, said Kernewood being the subject matter of this suit, and the said lessors released the United States from all claims on account of the property so returned. At the same time the plaintiff gave to the United States a "renewal lease" of the said property known as Kernewood bearing the date of June, 1921, and the United States continued in possession of the said property known as Kernewood. The said renewal lease was for a period of one year, terminating on the 30th day of June, 1922, and contained no right of renewal. Said lease provided, among other things, as follows:

"The lessee agrees on or before the expiration of this extension to remove all structures placed by it on said 27-acre tract and restore the same to the condition in which it was when possession was first taken under said original lease, ordinary wear and tear excepted."

IV. Between November 24, 1917, and June 30, 1921, the United States erected upon the said twenty-seven (27) acres known as Kernewood certain buildings and structures, among which were dormitories, a power plant, and a swimming pool for use in connection with the said home and school for blind soldiers maintained upon the said premises by the United States. The said buildings and structures were erected upon foundations of brick or concrete or both, which were placed upon said premises by the United States.

V. Under date of June 9, 1922, the plaintiff by another written instrument leased to the United States the said twenty-seven (27) acres known as Kernewood for another period of one year, beginning July 1, 1922, and extending to June 30, 1923, with the right of renewal by the lessee from year to year, but not beyond June 30, 1925. The said lease provided, among other things, as follows:

"Article 5. * * * It is agreed by the parties hereto that the lessee may install, at its own expense, special fixtures and equipment as may be required by the United States Veterans' Bureau, such special fixtures and equipment to be furnished at the expense of the said lessee.

"Article 6. That upon the expiration of this instrument, or any renewal hereof, the said lessee will return the demised

premises in like good order and condition as when first received by the United States under lease agreement of November 24, 1917, hereinbefore mentioned; depreciation, use, ordinary wear and tear, fires, and other unavoidable casualties excepted; it being understood and agreed, however, that the lessee shall not be liable for rental as provided by article 2 hereof during the time required to effect such restoration, if any, after vacation of said premises by said lessee, work of restoration to be prosecuted without unreasonable delay, and in any case within a period of not exceeding sixty (60) days.

"Article 7. That all fixtures, equipment, and improvements fixed to or erected, or placed in or upon the said premises by the lessee, at its expense, shall be and remain the exclusive property of the lessee."

The United States continued in use and occupation of the property under the above-mentioned lease and renewals thereof from July 1, 1922, to and including June 30, 1925.

VI. On June 30, 1925, the United States surrendered to the plaintiff the said twenty-seven (27) acres known as Kernewood, and subsequent to that date the United States removed, in part, the said buildings and structures erected upon the said premises by the United States, but in no case did the United States remove the foundations or the cellars or the concrete floors of such buildings and structures or any of them, although the said John W. Garrett repeatedly demanded of the United States the removal of said brick and concrete foundations, cellars, and floors. Neither at the time of the surrender of the said premises by the United States on June 30, 1925, nor at any subsequent time did the United States restore the said premises to like good order and condition as when first received by the United States on November 24, 1917, depreciation, use, ordinary wear and tear excepted.

VII. Upon the failure and refusal of the United States to remove the said foundations, cellars, and floors of brick and concrete, the plaintiff caused their removal at his own expense. The removal of said foundations necessitated the blasting of the concrete and the breaking up of the brick and the removal of both from the property, also the filling in of the holes and the grading of the surface of the ground.

The cost to the plaintiff of the said work of removal was as follows:

For removing the brick and concrete	$2, 565. 00
For filling in and grading the holes left by the concrete and brick	150. 00
Total	2, 715. 00

The said amounts were reasonable expenditures for the removal of the brick and concrete left upon the said property by the United States and for the restoration of the said property to like good order and condition as when first received by the United States on November 24, 1917, depreciation, use, ordinary wear and tear excepted, and no part of the said $2,715.00 was expended to do more than restore the said property to said like good order and condition, and such removal was necessary in order that plaintiff might make appropriate use of his property.

The court decided that plaintiff was entitled to recover $2,715.00.

GREEN, *Judge*, delivered the opinion of the court:

The plaintiff brings this suit to recover damages alleged to have been sustained by reason of a breach of the terms of a lease made with the United States for a 27-acre tract of land known as Kernewood, located in the suburbs of Baltimore, Maryland.

On November 24, 1917, the plaintiff, being the owner of the tract of land known as Kernewood, and together with his mother and brother also being the owner of certain adjoining property in Baltimore, Maryland, leased said property with the right of renewal until the summer of 1921. Subsequently the same parties leased to defendant on similar terms certain adjoining property. The leases contemplated the erection of buildings and improvements on the land leased and provided that they should be removed by the lessee within sixty days after the premises were vacated under the lease. These leases were renewed and defendant retained possession of the property until June 30, 1921, when the lease for all the property was canceled and a new lease entered into at the same time for the portion known as Kernewood

for the year ending June 30, 1922. The defendants surrendered to the lessors the property which had been leased from them, except the 27 acres known as Kernewood, and the lessors released the defendant from all claims on account of the property so returned. The new lease made for Kernewood terminated on the 30th of June, 1922, and provided, among other things, that—

"The lessee agrees on or before the expiration of this extension to remove all structures placed by it on said 27-acre tract and restore the same to the condition in which it was when possession was first taken under said original lease, ordinary wear and tear excepted."

Thereafter, the defendant erected upon the premises known as Kernewood certain buildings and structures upon foundations of brick or concrete.

On June 9, 1922, the plaintiff, as the sole owner, leased to the Veterans' Bureau for the year ending June 30, 1923, the tract known as Kernewood, the lease containing a provision to the effect that upon the expiration of the lease or any renewal thereof the lessee should return the premises in as good order and condition as when first received by the United States under the lease agreement of November 24, 1917, ordinary wear and tear, etc., excepted. The lease was renewed until June 30, 1925, when Kernewood was surrendered to the plaintiff. Defendant removed its buildings but did not remove the foundations thereof, which plaintiff was subsequently required to remove in order to make appropriate use of his property. The cost to plaintiff for removal of the foundations left by the Government was $2,715.00.

A mere statement of the facts in the case is sufficient to show that the plaintiff is entitled to recover. Some claim is made that plaintiff executed a release to the Government in June, 1921, releasing the defendant from all claims which plaintiff had or might have in the future arising out of the Government's lease and occupation of the premises, but the release then executed applied only to the property outside of the Kernewood tract, and the damages sought to be recovered in this case are by reason of the Government having left on that tract the foundations of the buildings which it had constructed thereon.

It follows that judgment must be entered for the plaintiff as prayed in his petition and it is so ordered.

WILLIAMS, *Judge*, and LITTLETON, *Judge*, did not hear and took no part in the decision of this case.

GRAHAM, *Judge*, and BOOTH, *Chief Justice*, concur.

EDWARD A. BROWN v. THE UNITED STATES

[No. D-926. Decided December 2, 1929]

On the Proofs

Army pay; travel under orders; mileage allowance; actual expense; break in voyage to destination outside the United States.—Where an Army officer stationed in New York is ordered to report for duty at Manila, Philippine Islands, and in traveling thereto to take an Army transport from New York City to San Francisco and therefrom another Army transport, the travel was one voyage, the destination of which was "outside the limits of the United States in North America," and the officer was not, under section 12 of the act of June 10, 1922, entitled to mileage allowance from New York City to San Francisco, but actual expenses only.

The Reporter's statement of the case:

Messrs. S. T. Ansell and *George M. Wilmeth* for the plaintiff.

Mr. M. C. Masterson, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff, Edward A. Brown, is a citizen of the United States. During the time covered by this suit the plaintiff held the rank of major, Adjutant General's Department, United States Army.

II. Under date of April 14, 1922, War Department Special Orders, No. 87–O, were issued, paragraph 17 of which provided as follows:

"Major Edward A. Brown, adjutant general, is relieved from duty at headquarters, Second Corps Area, Governors Island, New York, effective at such time as will enable him to comply with this order, will proceed, on the transport

scheduled to sail from New York City on or about July 20, 1922, to Manila, Philippine Islands, and upon arrival at Manila will report in person to the commanding general, Philippine Department, for assignment to duty. Major Brown will apply, immediately, by letter, to the Chief of Transportation, Office of the Quartermaster General, Munitions Building, Washington, D. C., for accommodations for so much of the journey as requires water transportation.

"The travel directed is necessary in the military service and is chargeable to procurement authority FD 26 P 2451 A3."

And on July 14, 1922, War Department Special Orders, No. 163, were issued, paragraph 53 of which amended the order above quoted in the following respects:

"So much of paragraph 17, Special Orders, No. 87-O, War Department, April 14, 1922, as directs Major Edward A. Brown, adjutant general, to proceed on the transport scheduled to sail from New York City on or about July 20, 1922, to Manila, Philippine Islands, is amended so as to direct that officer to proceed on the transport scheduled to sail from New York City on or about July 20, 1922, to San Francisco, California, and upon arrival at San Francisco to proceed to Manila, Philippine Islands, on the transport scheduled to leave that port on or about August 5, 1922.

"The travel directed is necessary in the military service and is chargeable to procurement authority FD 26 P 2451 A3."

III. Pursuant to said orders plaintiff sailed from New York on July 20, 1922, on the Army transport *U. S. Grant*, traveling without troops via the Panama Canal, and arrived at San Francisco, California, on August 8, 1922, and on August 10, 1922, sailed from there on the Army transport *Thomas* for Manila, Philippine Islands, at which port he arrived on September 6, 1922.

IV. Upon arrival of plaintiff at San Francisco, California, on August 8, 1922, as aforesaid, the finance officer, United States Army, at that port, paid him mileage for travel from New York City to San Francisco, which mileage was computed in accordance with the provisions of section 12 of the act of June 10, 1922 (42 Stat. 631). The amount so paid to plaintiff, after deducting the value of subsistence, furnished en route from New York City to San Francisco, was $131.00. Subsequently—that is, on May 31, 1923—by order of the Secretary of War, this amount was refunded to the Government by the plaintiff.

V. Plaintiff is the sole owner of the claim involved in this suit, no part of which has ever been sold, assigned, or discharged; and if he is entitled to mileage from New York City to San Francisco, California, as claimed in said suit, he is entitled to judgment for $131.00.

The court decided that plaintiff was not entitled to recover.

WILLIAMS, *Judge*, delivered the opinion of the court:

Plaintiff, an Army officer, stationed at Governors Island, New York, was directed by War Department Special Orders, No. 87–O issued April 14, 1922, to proceed on a transport scheduled to sail from New York on or about July 20, 1922, to Manila, Philippine Islands, and to report in person to the commanding general of the Philippine Department.

Later, on July 14, 1922, War Department Special Orders, No. 87–O, were amended "so as to direct that officer [Major Brown] to proceed on the transport scheduled to sail from New York City on or about July 20, 1922, to San Francisco, California, and upon arrival in San Francisco to proceed to Manila, Philippine Islands, on the transport scheduled to leave that port on or about August 5, 1922."

In accordance with the amended special orders the plaintiff sailed from New York on July 20, 1922, on the Army transport *U. S. Grant*, traveling without troops, via Panama Canal, arrived at San Francisco, California, on August 8, 1922, and two days later, on August 10, 1922, sailed from there on the Army transport *Thomas* for Manila, Philippine Islands.

Plaintiff claims he is entitled to the travel pay allowance of 8 cents per mile authorized in section 12, act of June 10, 1922 (42 Stat. 631), for that part of his voyage between New York and San Francisco, California.

The statute under which the claim is made follows:

"SEC. 12. That officers of any of the services mentioned in the title of this act, when traveling under competent orders without troops, shall receive a mileage allowance at the rate of 8 cents per mile, distance to be computed by the shortest usually traveled route and existing laws providing for the issue of transportation requests to officers of the Army traveling under competent orders, and for deduction to be made from mileage accounts when transportation is fur-

nished by the United States, are hereby made applicable to all the services mentioned in the title of this act, but in cases when orders are given for travel to be performed repeatedly between two or more places in the same vicinity, as determined by the head of the executive department concerned, he may, in his discretion, direct that actual and necessary expenses only be allowed. Actual expenses only shall be paid for travel under orders outside the limits of the United States in North America."

Had plaintiff proceeded from New York to Manila under War Department Special Orders, No. 87, "On a transport scheduled to sail from New York City on or about July 20, 1922, to Manila, Philippine Islands," on one uninterrupted voyage, he would not have been entitled to the travel pay allowance of 8 cents per mile. His travel pay allowance would unquestionably have been fixed by that provision of section 12, act June 10, 1922, which reads, "Actual expenses only shall be paid for travel under orders outside the limits of the United States in North America." But it is urged that "the orders in terms required travel (*a*) from New York by way of Panama Canal to San Francisco, and (*b*) from San Francisco to Manila," "two distinct voyages," or "two distinct legs" of a single voyage, and that he is entitled to the travel pay of 8 cents a mile for that part of the voyage, or leg of the voyage, between New York and San Francisco.

This court in the case of *Hutchins* v. *United States*, 27 C. Cls. 137, laid down the rule that the destination rather than the route taken determined whether travel under orders by Army officers was within the United States or abroad.

The Supreme Court, 151 U. S. 542, in affirming the decision of this court in the *Hutchins case* said:

"We think the Court of Claims was correct in its conclusion that the question whether travel is abroad or within the United States should be determined by the termini of the journey rather than by the route actually taken. Instances are frequent where an officer ordered from one place to another within the United States is obliged to perform the whole or a substantial part of his journey either upon the high seas or upon foreign soil. If, for example, he were ordered from Buffalo to Detroit, or from New York to Galveston by sea, it would be sticking in the bark to speak of either as 'travel abroad,' because in the one case

the most direct route lies through Canada, and in the other the voyage is made upon the high seas. While the voyage in question was not literally 'in the United States,' it was within the intent and spirit of the enactment. An officer is to be understood as traveling abroad when he goes to a foreign port or place under orders to proceed to that place."

In this case the plaintiff was directed to take a certain transport from New York City to Manila, Philippine Islands. Later he was directed to take a transport leaving New York on or about a certain date for San Francisco, California, and upon arriving at San Francisco to proceed upon another transport to Manila, Philippine Islands.

In each case Manila was the plaintiff's destination. It was the "termini" of the voyage, and by it the character of plaintiff's travel must be determined.

Plaintiff was directed by special orders to report to the commanding general at Manila. It could make no difference whether he went all the way from New York to Manila on one transport, or whether he traveled on one transport to San Francisco and from that point traveled on another transport to his final destination. It was one voyage, the end of which was Manila, and must be considered in its entirety. He was only entitled to his "actual expenses for travel under orders outside the limits of the United States in North America," as provided in section 12, act of June 10, 1922.

It is therefore the judgment of the court that plaintiff's petition be, and the same is hereby, dismissed. And it is so ordered.

Littleton, *Judge;* Green, *Judge;* Graham, *Judge;* and Booth, *Chief Justice*, concur.

GEORGE A. BEW v. THE UNITED STATES [1]

[No. H-389. Decided December 2, 1929]

On the Proofs

Federal income tax; State officer; branch pilot, Virginia; exemption from Federal taxation.—A branch pilot in the State of Virginia, whose fees are derived solely from those for whom he

[1] Certiorari denied.

Reporter's Statement of the Case

performs services, i. e., masters, owners, and consignees, who is not acting for the State, exercising any of its public functions, or aiding in carrying out its sovereign powers in the course of his employment, is not exempt from the Federal income tax in respect of such fees, notwithstanding he can not act except under State license, accept other than statutory fees, nor perform his services otherwise than in accordance with State regulations.

The Reporter's statement of the case:

Messrs. R. Palmer Ingram and *George R. Shields* for the plaintiff.

Mr. Joseph H. Sheppard, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. Plaintiff, at all times involved in this suit, was a duly licensed branch pilot having qualified therefor under the laws of the State of Virginia. He received no salary or other compensation from the State of Virginia for such services. His income from his calling was derived solely from fees paid to him by the masters, owners, and consignees of the vessels utilizing his services, which fees are prescribed by the laws of the State of Virginia.

II. Any resident of the State of Virginia is eligible to become a branch pilot, and adoption of apprentices into the service is determined by the pilots themselves, the State of Virginia having no voice in the matter. When the pilots consider that the needs of commerce demand an increase in their number, they select the required number of young men as apprentices and train them until they become qualified to undergo examination and, if successful, receive their licenses as pilots.

III. Plaintiff made and filed individual income-tax returns with the collector of internal revenue at Richmond, Virginia, and paid taxes on income derived from services as a pilot, for the years and at the dates specified below:

For the year 1920

Feb. 26, 1921	$282.71
June 14, 1921	399.21
Sept. 8, 1921	399.21
Dec. 21, 1921	49.70

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As amended May 5, 1921:

May 5, 1921	$116.50
Dec. 21, 1921	349.48

For the year 1921

Feb. 23, 1922	$70.41
June 12, 1922	70.41
Sept. 11, 1922	70.41
Dec. 9, 1922	70.38

For the year 1922

Mar. 2, 1923	$36.48

For the year 1923

Mar. 1, 1924	$11.94
June 13, 1924	5.97
Aug. 6, 1924	11.94
Sept. 9, 1924	17.91

Additional assessment for 1923:

Feb. 6, 1925	$22.50

For the year 1924

Mar. 3, 1926	$22.78

For the year 1925

Mar. 4, 1926	$29.37

IV. On the 15th day of March, 1926, plaintiff filed with the Commissioner of Internal Revenue by and through one of his agents, the collector of internal revenue at Richmond, Virginia, claims for refund of taxes for the calendar years 1920, 1921, 1922, 1923, 1924, and 1925. The grounds of said claims for refund were that the income and compensation received by plaintiff as a branch pilot should have been exempt from taxation, as the law providing for his appointment and the regulation of his duties as such branch pilot constituted him a State officer performing an essential governmental function. These claims for refund were rejected by the commissioner.

The court decided that plaintiff was not entitled to recover.

Green, *Judge*, delivered the opinion of the court:

The plaintiff brings this suit to recover taxes paid by him on income derived solely from his earnings as a Virginia pilot during the years 1920 to 1925. Counsel for plaintiff

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states in his brief that "it involves the single question whether the plaintiff is an officer or servant of the State of Virginia whose earnings were derived from the exercise of a governmental function."

In considering the question of whether the plaintiff was an officer of the State, we find that the courts have been unable to frame a definition which will meet the requirements of the case; and that because of the variety of meanings or shades of meaning in which the terms "office" and "officer" may be employed, each case must be determined by a consideration of the statutes of the State which apply to the position under consideration, together with the particular facts and circumstances involved.

In the instant case, it appears that the plaintiff was what is called a branch pilot. He was licensed under the laws of the State of Virginia. The license was obtained through examination by a board created by statute for the purpose of determining the qualifications of pilots. The laws of Virginia require that pilots give a bond, have certain equipment, fix the amount of fees which they may charge, and also to a certain extent regulate the performance of their duties. The law also provides for their removal or suspension for specified causes. But all this, in our opinion, was merely a matter of regulation and in so doing the State was merely exercising a power which has often been used with reference to other callings and professions.

The plaintiff received no compensation from the State, and his income from his calling was derived solely from fees paid him by parties making use of his services. Any resident of the State of Virginia is eligible to become a branch pilot, and the adoption of apprentices into the service is determined by the pilots themselves, who constitute a voluntary association. When the pilots consider that the needs of commerce demand an increase in their number they select the required number of young men as apprentices and train them until they become qualified to undergo examination, when, if successful, they receive their licenses as pilots.

In order to exempt the plaintiff from the payment of the tax it must appear that the collection thereof in some way

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prevented the State from exercising some governmental function, or in some way impaired its ability to make use of such function. In other words, the tax is a valid one if it does not in any way interfere with the State exercising its powers of government under the Constitution.

We do not think the plaintiff was a public officer. To be a public officer he must have held an office as a part of the State government. The term "office" implies a delegation to a certain extent of sovereign power to it, and possession of it by the person filling the office; that is, an authority is conferred to exercise some portion of the sovereign power of the State either in making, administering, or executing the laws. See cases cited in 46 Corpus Juris 923, note 30 (a). The fact that the plaintiff was licensed by the State of Virginia was not enough to make him an officer or agent of the State, nor did the fact that his duties were to a certain extent regulated by the State make him an officer of the State. If this were not the rule a pawnbroker in many States would be a State officer. The statutory provisions with reference to his appointment, the fees which he might charge, and the duties which he was to perform were instances of exercise of sovereign power on the part of the State, but he was not acting for the State, exercising any of its public functions, or aiding in carrying out any of its sovereign powers when, in the course of his employment, he directed the course of vessels so that they might neither be injured themselves nor injure others, which was his principal duty as a pilot. The State provided a board for the examination of pilots, similar to boards that are provided for the examination of doctors and lawyers. The object and purpose in creating such boards obviously is to determine the qualifications of those who intend to enter the ranks of these professions and prevent the public from receiving damage which might occur from the admission to practice in a profession or calling of incompetent or unworthy individuals. It is often said that lawyers are officers of the court, but we think that no one would contend that the income which they receive from their private practice was not subject to taxation. It will be observed also that the State had no voice in determining who

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might become branch pilots. This matter was determined entirely by the pilots' association.

On the whole, we conclude that the plaintiff was not a public officer of the State of Virginia, and that a tax levied upon the income of branch pilots, derived through their services as pilots, would not hinder, restrain, or interfere with the State of Virginia in exercising any governmental function. It follows that plaintiff is not entitled to have refunded the taxes involved herein.

These views make it unnecessary for us to determine to what extent the plaintiff may be barred from a recovery of any of the tax paid by reason of having failed to file a claim for refund within the time prescribed by law.

The petition of plaintiff must be dismissed, and it is so ordered.

WILLIAMS, *Judge*, and LITTLETON, *Judge*, did not hear and took no part in the decision of this case.

GRAHAM, *Judge*, and BOOTH, *Chief Justice*, concur.

FRED LIND v. THE UNITED STATES

[No. D-925. Decided December 2, 1929]

On the Proofs

Army pay; furlough of enlisted man; allowances while on furlough.—(1) An enlisted man of the United States Army, master sergeant, who in lieu of quarters and subsistence in kind was being furnished $1.20 a day for rations and 75 cents a day for quarters, and was given a month's furlough beginning July 1, 1924, was, during his furlough, entitled only to a daily monetary ration allowance of 30 cents and to no allowance for quarters. Subparagraph (3) of paragraph 7 (c) of Army Regulations 35-4520, as amended September 1, 1923, which purported to give such enlisted man during his furlough the same allowances as when on duty, was not authorized by section 11, act of June 10, 1922, and the Executive order of June 19, 1922, made pursuant thereto, and was invalid. (2) Section 11 of the act of June 10, 1922, limited the authority to fix by regulation an allowance for quarters and subsistence for enlisted men of the Army to cases involving men on duty.

The Reporter's statement of the case:

Mr. S. T. Ansell for the plaintiff.

Mr. M. C. Masterson, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff enlisted in the Regular Army of the United States December 11, 1914, and served continuously therein as an enlisted man up to the date of this suit, December 4, 1924.

II. June 20, 1920, he was assigned or stationed for duty on detached service in the office of the Chief of Field Artillery, U. S. Army, at Washington, D. C., in the grade of master sergeant, and served in that office and in that grade from the date of his assignment up to the date on which this action was filed. At no time during such period was he furnished quarters or subsistence in kind but in lieu thereof plaintiff received, except for the period of furlough hereinafter mentioned, monetary allowances, as prescribed by law and regulations promulgated thereunder, of $1.20 a day for rations and $0.75 a day for quarters.

III. From July 1, 1924, to July 31, 1924, plaintiff was on duly authorized furlough, upon the expiration of which he returned to duty in the office of the Chief of Field Artillery. Thereupon he was paid for the furlough period an allowance for quarters at the rate of $0.75 a day, totaling $23.25. It appears that no payment was made to plaintiff for the furlough period as an allowance for rations before the matter was decided by the Comptroller General, who held that for the period July 1 to July 31, 1924, plaintiff was entitled only to a daily monetary ration allowance of $0.30, or a total of $9.30, and to no allowance for quarters. As a result, plaintiff received only $9.30 as the allowance for rations during the furlough period; the amount of $23.25, paid as an allowance for quarters, being refunded by plaintiff through the deduction thereof from his November, 1924, pay.

The court decided that plaintiff was not entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

Plaintiff, an enlisted man of the grade of master sergeant in the Regular Army, was not furnished quarters or rations in kind and was, therefore, entitled to receive a monetary allowance. He was on furlough from July 1 to July 31, 1924, and he claims that during this period he was entitled to receive $0.75 a day in lieu of quarters and $1.20 a day in lieu of subsistence, or a total of $60.45. Having been paid $9.30 as the regular allowance for commutation in lieu of rations, he asks judgment for $51.15. He bases his claim upon sec. 11, act of June 10, 1922 (42 Stat. 630), Executive order, June 19, 1922, and Army Regulations No. 35-4520, December 8, 1922, as amended by change 1, September 1, 1923, issued by the Secretary of War.

Sec. 1293, U. S. Revised Statutes, provides that every enlisted man shall be entitled to receive one ration daily. An examination of various acts of Congress for many years making appropriations for the War Department shows that provision has uniformly been made for payment "of the regulation allowances for commutation in lieu of rations to enlisted men on furlough." In the same acts provision was made "for commutation of quarters * * * to enlisted men on duty at places where no public quarters are available." In the act of June 10, 1922 (42 Stat. 630), entitled "an act to readjust the pay and allowances of the commissioned and enlisted personnel of the Army, Navy, Marine Corps, Coast Guard, Coast and Geodetic Survey, and Public Health Service," sec. 11 thereof provides as follows:

"That warrant officers of the Army, including those of the Army Mine Planter Service, of the Navy, Marine Corps, and Coast Guard, shall be entitled at all times to the same money allowance for subsistence as is authorized in section 5 of this act for officers receiving the pay of the first period, and to the same money allowance for rental of quarters as is authorized in section 6 of this act for officers receiving the pay of the first period. To each enlisted man not furnished quarters or rations in kind there shall be granted, under such regulations as the President may prescribe, an allowance for quarters and subsistence, the value of which shall depend on the conditions under which the duty of the man is being performed, and shall not exceed $4 per day. These regulations shall be uniform for all the services mentioned in the title

of this act. Subsistence for pilots shall be paid in accordance with existing regulations, and rations for enlisted men may be commuted as now authorized by law."

Section 5 of this act provides that each commissioned officer on the active list, or on active duty below the grade of brigadier general or its equivalent, in any of the services mentioned in the title of this act, shall be entitled at all times, in addition to his pay, to a money allowance for subsistence, and section 6 provides that each commissioned officer shall be entitled at all times, in addition to his pay, to a money allowance for rental of quarters.

On June 19, 1922, the following Executive order was made:

"Under authority of the act of Congress approved June 10, 1922, the following allowances for quarters and subsistence for enlisted men, who are not furnished quarters or rations in kind, are announced and made applicable to the Army, Navy, Marine Corps, Coast Guard, Coast and Geodetic Survey, and Public Health Service: * * *

"Table I. Men on duty where quarters or rations in kind are not furnished will be granted daily allowances as follows:

"A. General:

(a) Subsistence.. $1.20

(b) Quarters.. .75"

Army Regulations 35–4520, par. 7 (c), as amended September 1, 1923, provides that an enlisted man on furlough under ordinary circumstances is entitled to the money value of one garrison ration and to no allowance for quarters.

By Paragraph III of War Department General Order No. 16, dated June 23, 1924, the money value of a garrison ration for the fiscal year ended June 30, 1925, was fixed at $0.30, as follows:

"The commutation value of the garrison ration for enlisted men of the Army, except the Philippine Scouts, for the fiscal year 1925 is hereby fixed at 30 cents per ration. The commutation value of the garrison ration for the Philippine Scouts for the fiscal year 1925 is fixed at 25 cents per ration.

"The foregoing values will be effective from July 1, 1924, and will have application to the commutation of the money value of the ration due on account of furloughs and due to

students of the advanced course, Reserve Officers' Training Corps, but they will not apply to credits due organizations on ration and savings accounts."

However, by subparagraph (3) of paragraph 7 (c), of Army Regulations 35-4520, as amended September 1, 1923, provision is made as follows:

"An enlisted man on furlough from a station at which he is in receipt of the monetary allowances in lieu of quarters and subsistence receives these allowances at the same rate while on furlough, but only in case of return to duty at the same station upon expiration of furlough."

The defendant contends that sec. 11 of the act of June 10, 1922, made no provision for the payment of the allowances for subsistence and quarters to enlisted men on furlough at the rates fixed for said purposes while on duty; that Executive order of June 19, 1922, limited payments in lieu of subsistence and quarters to enlisted men on duty; that the provision of subparagraph (3) of paragraph 7, of Army Regulations 35-4520, was invalid and contrary to law; that the plaintiff was entitled only to regulation allowance for commutation in lieu of rations to enlisted men on furlough; that this amount having been paid, he is not entitled to any further amount.

The court agrees with the position taken by the defendant. The various acts of Congress making appropriations for the Army have provided for the payment of allowances for quarters of enlisted men on duty where public quarters were not available and for the payment of the regulation allowance for commutation in lieu of rations to enlisted men on furlough. The act of June 10, 1922, while making specific provision for the payment of allowances for quarters and subsistence at all times to certain officers did not provide for allowances for quarters and subsistence for enlisted men at all times, but provided that these allowances should be granted under such regulations as the President might prescribe, and that the nature of such allowances should depend on the conditions under which the duty of the man is being performed.

We think this language of the act limited the authority to fix the allowance by regulation to men on duty. The

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amount not in excess of $4 a day, specified by the statute to be fixed by regulation, was provided because necessary for the due performance of duties. It is not necessarily a fixed allowance attached to enlistment status. The allowances prescribed in Executive order of June 19, 1922, were specifically limited to men on duty. An enlisted man on furlough is not on duty. *McKenna* v. *United States*, 23 C. Cls. 308; *Jackson* v. *United States*, 50 C. Cls. 392. The last sentence of sec. 11 provided that "rations for enlisted men may be commuted as now authorized by law," and the existing law made provision for payment "of the regulation allowances for commutation of rations to enlisted men on furlough," act of June 7, 1924, 43 Stat. 477. The item of quarters is not taken into account in making allowances to the men on furlough. *Jackson* v. *United States*, *supra*. Subparagraph (3) of paragraph 7 (c), of Army Regulations 35–4520, as amended, making provision for payment to enlisted men on furlough of allowances in excess of the regulation allowance for commutation of rations is not authorized by sec. 11, act of June 10, 1922, and the Executive order of June 19, 1922, and is therefore invalid.

In the act of April 15, 1926, 44 Stat. 254, making appropriations for the War Department for the fiscal year ending June 30, 1927, entitled "An act making appropriations for the military and nonmilitary activities of the War Department for the fiscal year ending June 30, 1927, and for other purposes," it is provided that "Hereafter enlisted men, including the members of the U. S. Army Band, entitled to receive allowances for quarters and subsistence shall continue, while their permanent stations remain unchanged, to receive such allowances while sick in hospital or absent from their permanent-duty stations in a pay status: *Provided further*, That allowances for subsistence shall not accrue to such enlisted man while he is in fact being subsisted at Government expense." This later enactment, which is relied upon by both the plaintiff and the defendant in support of their contentions, has no bearing upon the question involved in this suit.

The plaintiff has received the regulation allowance for commutation in lieu of rations of $9.30, which, under the

statute, was the amount to which he was entitled while on furlough. It follows that the petition of the plaintiff must be dismissed and it is so ordered.

WILLIAMS, *Judge;* GREEN, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

HENRY ESCHER, ANCILLARY ADMINISTRATOR OF JAK ROBERT SIGG-FEHR, DECEASED, GOTTFRIED RUDOLPH BAUMAN-KIENAST, AND EDMUND GAMS, v. THE UNITED STATES[1]

[No. K-195. Decided December 2, 1929]

On Demurrer to Petition

Res adjudicata; suit under trading-with-the-enemy act; exclusive relief; nominal difference in defendants.—The relief and remedy provided by section 9 and by paragraph 4, subsection (c), section 7, of the act of October 6, 1917, as amended (trading-with-the-enemy act), is exclusive. Suit instituted in accordance with its terms in the Supreme Court of the District of Columbia against the Alien Property Custodian and the Treasurer of the United States to recover shares of stock seized by the custodian, or the proceeds thereof, is also, when adjudicated therein, res adjudicata as to the amount recoverable. On either of these grounds another suit to recover alleged profits made on the resale of such stock by the Director General of Railroads (to whom the custodian had originally sold it) can not be maintained in the Court of Claims, nor does the fact that the defendants in the two cases are not nominally the same alter the situation, as the real defendant is the United States.

The Reporter's statement of the case:

Mr. Alexander Holtzoff, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the demurrer.

Mr. Spier Whitaker, opposed. Messrs. *Lawrence A. Baker*, *Lyttleton Fox*, and *Henry Ravenel* were on the brief.

The opinion sets forth the material allegations of the petition.

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[1] Certiorari denied.

GREEN, *Judge*, delivered the opinion of the court:

The petition alleges that Jak Robert Sigg-Fehr (deceased when this action was begun) and two other parties named in the title of the action (all citizens of Switzerland) were and are the owners of certain property which in the year 1918 was illegally seized by the Alien Property Custodian of the United States and by him purported to be sold to the Director General of Railroads of the United States; that this property consisted of certain shares of stock for which the Director General paid the Alien Property Custodian $200 a share, or a total of $2,565,000, as the purported price; that the Director General, during the time he held such property, received dividends on said stock to the amount of $448,875 and sold the same at the rate of $248 a share, aggregating $3,180,600, which sum, together with the said dividends, making a total of $3,629,475, was by the Director General covered into the Treasury of the United States; that at the time when the said shares of stock were purported to be sold by the Alien Property Custodian to the Director General of Railroads they had a market value of $300 a share.

The petition further alleges that in December, 1921, the former owners of the stock brought a suit in equity under section 9 of the trading-with-the-enemy act in the Supreme Court of the District of Columbia against the Alien Property Custodian and the Treasurer of the United States, in which suit they sought a decree determining their ownership and adjudging that the shares of stock or the proceeds therefrom, including the $248 a share received by the Director General of Railroads, as well as the dividends received by him and by the Alien Property Custodian, be paid over to them; that in January, 1928, a final decree was rendered in that suit in favor of the plaintiffs adjudging that the plaintiffs were in fact the owners of the stock at the time of the seizure and directing the return of the stock to them, or in event the Alien Property Custodian had sold the same, that there be paid to them the proceeds of such sale; that pursuant to the decree in the suit last referred to the Alien Property Custodian and the Treasurer of the United States paid to plaintiffs the sum of $2,565,000

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representing the purchase price of $200 a share paid by the Director General of Railroads to the Alien Property Custodian, but not including any profit realized by the Director General of Railroads or any of the dividends received by him on the stock so sold.

The petition in the case at bar further avers that the seizure of the stock did not operate to divest the plaintiffs of the ownership thereof, and that the sum of $1,064,475 received by the Director General of Railroads over and above the price he paid to the Alien Property Custodian was received in equity and good conscience to the use and account of plaintiffs, and by reason of that fact the United States is justly and truly indebted to the plaintiffs in that sum with interest from the time that the money was received by the Director General of Railroads and was covered by him into the Treasury.

Plaintiffs therefore ask judgment in the sum of $1,064,475.

The defendant demurs to the petition on the following grounds:

(1) That this court has no jurisdiction of the alleged cause of action set forth in the petition.

(2) That the petition does not state facts sufficient to constitute a cause of action.

(3) That it appears on the face of the petition that the alleged cause of action accrued more than six years prior to the commencement of the action.

(4) That it appears on the face of the petition that the plaintiffs heretofore brought an action against the defendant in the Supreme Court of the District of Columbia for the same cause of action as is alleged in the petition herein and that the said plaintiffs duly recovered judgment therein upon the merits against the defendant.

In determining the questions presented by the demurrer, there are two principles that must be kept in mind: First, that this court has only such jurisdiction as is conferred upon it by statute; second, that suits against the United States can only be brought in such manner and under such terms and conditions as are provided by statute. Applying these principles, it becomes necessary to determine what right

of action, if any, is given the plaintiff in cases such as the one at bar, and how, if at all, this right is limited.

Turning to the statute, we find that section 7, subsection (c), paragraph 4, of the trading-with-the-enemy act (act of October 6, 1917), to which was added an amendment enacted on November 4, 1918, 40 Stat. 1021, provides as follows:

"The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this act, and in the event of sale or other disposition of such property by the Alien Property Custodian, shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States."

If this provision is constitutional it is plain that whatever remedy the plaintiffs have for the actions complained of in their petition must "be that provided by the terms of this act."

Section 9 of the act, as amended by the act of July 11, 1919, 41 Stat. 35, provides, among other things, that any person not an enemy or ally of enemy claiming any interest, right, or title to property taken over by the Alien Property Custodian may, after compliance with certain preliminary requirements "institute a suit in equity in the Supreme Court of the District of Columbia * * * (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed."

The remainder of the paragraph of the statute in which this quotation is made would seem to apply more particularly to cases where a person not an enemy or an ally of the enemy claims some interest in the property without claiming complete ownership thereof, but a careful reading of the whole of the section as amended convinces us that this section was intended to apply also to cases where, as in the case before the court, a claim was made of complete ownership by persons not enemies or allies of the enemy.

Opinion of the Court

Our principal reason for this holding is that an examination of the act as a whole shows that if the provisions of section 9 are not applied no remedy whatever is granted to persons whose property has been seized and who are not enemies or allies of the enemy, and a reading merely of the provisions quoted shows plainly, in our opinion, that it was intended to give a remedy to such persons.

The argument for the plaintiffs is that while it may have been necessary in the first instance to commence their action in accordance with the provisions of section 9 to determine their ownership of the property, they are not limited to the proceedings described in this section but may, if they have not received the full value of the property seized thereunder, bring another suit against the United States to recover the remainder of the value of the property for which they have not been paid. In this connection it is contended by plaintiffs that as the property was not in fact enemy property its seizure was not authorized. We do not think the claim that the seizure was not authorized merits extended discussion. The language of the trading-with-the-enemy act makes it clear that it was anticipated that in some instances property other than that of the enemy would be seized and taken over under it. Indeed, this was absolutely necessary to make the act effective. If the Alien Property Custodian always had to stop and have ascertained whether the property about to be seized was in fact the property of an enemy, the act would inevitably break down, for the greater part of persons whose property was seized would claim that the act did not apply to them.

The real basis of the argument on behalf of plaintiffs that they are not limited to the action provided by section 9 appears to be founded in the claim that it did not afford them full and proper relief. They contend that the provisions of section 7 that "in the event of sale or other disposition of such property by the Alien Property Custodian (the sole relief and remedy), shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States," have no application herein, and in support of this

contention it is urged in effect that it would not be constitutional to so limit the recovery in a case like the one at bar, and that even if this portion of the statute be held valid, it has no application to the instant case for the reason that there was in fact no legal sale.

We have no occasion to determine the validity of these contentions, but in connection with the claim that the statute is unconstitutional, it should be noted that the plaintiffs are not citizens of the United States. It seems to be conceded by plaintiffs that in the first instance, at least, the provisions of section 9 apply to cases where the property of a person not an enemy or an ally of an enemy had been seized, and they proceeded accordingly to commence their action in the Supreme Court of the District of Columbia. It having been determined that the provisions of section 9 apply, the only remaining question is whether plaintiffs were limited to the relief it gave.

In determining this question, as before stated, it is not necessary to pass on the validity of the provisions of section 7 which declare that the sole relief and remedy of any person having any claim to property seized by the Alien Property Custodian " shall be that provided by the terms of this act, and in the event of sale or other disposition of such property by the Alien Property Custodian, shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States." Clearly Congress had the right to prescribe, as it did in section 9, where the suit should be commenced and against whom, and in our opinion, the questions as to the validity of the provisions of section 7 should have been submitted to the Supreme Court of the District of Columbia. Whether they were so submitted, and if so whether the decision thereon was correct, are questions that are not necessary for us to consider or decide. If, as plaintiffs claim, the provisions to which they object were either invalid or inapplicable, they had the right to present this contention to that court, and whether so presented or not, when final judgment was entered in the suit which they had commenced, this, we think, was the end of plaintiffs' case. When Congress provided the place and manner of commenc-

ing a suit on behalf of a person whose property had been seized and who was not an enemy or an ally of an enemy, the effect was to exclude all other jurisdictions. "Where a statute creates a right and provides a special remedy, that remedy is exclusive." *United States* v. *Babcock*, 250 U. S. 328, 331. And this principle is especially applicable where Congress has conferred jurisdiction upon some court for the purpose of suit against the United States for compensation. *United States* v. *Pfitsch*, 256 U. S. 547, 552. Plaintiffs could not bring one suit in the courts of the District of Columbia to recover the value of their property seized, and then another in this court on the ground that they had not received full relief in the court provided by the act. It should be said also that while this suit is against the United States itself and the other suit was against the Alien Property Custodian and the Treasurer of the United States, these parties were the representatives of the Government, and a judgment in a suit against them had the same effect as a judgment in a case against the Government provided the issues were the same. In such a case the plaintiffs can no more bring another suit to recover the value of the property than could a taxpayer, who had brought suit against a Government tax collector to recover the value of property seized for payment of taxes, in which he failed, bring another suit against the Government to recover the value of the same property. In our opinion, the judgment rendered in the Supreme Court of the District of Columbia made the matter at issue in this case *res adjudicata*, and even if it did not, this court has no jurisdiction to consider the action brought, because Congress has provided another and a different remedy.

The views above expressed make it unnecessary for us to determine whether the case is barred by the statute of limitations.

It follows that the demurrer should be sustained and it is accordingly ordered that plaintiffs' petition be dismissed.

WILLIAMS, *Judge*, and LITTLETON, *Judge*, did not hear and took no part in the decision of this case.

GRAHAM, *Judge*, and BOOTH, *Chief Justice*, concur.

WILLIAM S. GRAY & CO. v. THE UNITED STATES

[No. E-182. Decided December 2, 1929]

On the Proofs

Income tax; deductible expenses; salaries; fixed percentages of profits.—The mere size of compensation paid by a taxpayer for services rendered is not determinative of its reasonableness as an ordinary and necessary expense, or of the question whether it was an "ordinary and necessary" expense at all. In determining these questions the court will take into consideration the circumstances of each case, and where the compensation questioned is in the form of a fixed percentage of the net profits, the nature of the business, the capabilities of the men employed, the possibility of their employment elsewhere at the same or greater compensation, the dependence of the success of the business upon their activities, the time and effort they give to the business, the salaries allowed in related business, the good faith of the arrangement, the ratio of compensation to stockholdings, whether the taxpayer's policy of paying fixed percentages of profits was a settled one, whether the percentage given was for services as executives or as directors, whether by agreement voluntarily entered into or not, and other relevant circumstances.

Same; presumption of reasonableness.—The action of a board of directors under ordinary circumstances in fixing salaries in a given case raises a fair presumption of their reasonableness, which must be rebutted.

Same; deduction from gross income.—The facts reviewed and *held*, that the fixed percentages of net profits paid by plaintiff to certain of its officers in addition to their regular salaries was for 1916 and 1917 a part of the "ordinary and necessary expenses" of the plaintiff and for 1918 so reasonable as to justify their being treated as part of the plaintiff's "ordinary and necessary expenses," and as such deductible from gross income for income-tax purposes.

The Reporter's statement of the case:

Mr. Thomas G. Haight for the plaintiff. *Messrs. Robert H. Montgomery* and *J. Marvin Haynes* were on the briefs.

Mr. Fred K. Dyar, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

Reporter's Statement of the Case

The facts as found by the court are as follows:

I. Plaintiff is a New York corporation organized in 1904, and engaged since that time in the business of acting as a commission merchant in chemicals and as an exporter and importer of chemicals. It is the successor to the business which was founded by William S. Gray in 1880 and carried on by him until the organization of the plaintiff.

The business conducted was peculiarly personal in that it depended exclusively upon the exertions of the men who received, as hereinafter shown, percentages of profits, and the character of the business was relatively unique in that few, if any, during the taxable years hereinafter referred to, other than plaintiff, were in the same business, the plaintiff handling approximately 95 per cent of the acetate of lime and wood distillation business in the country, there being little competition.

II. Plaintiff filed its income-tax return for the year ended December 31, 1916, on or about February 20, 1917; and its income and excess-profits tax returns for the year ended December 31, 1917, on or about March 29, 1918; and its income and profits tax returns for the year ended December 31, 1918, on or about May 19, 1919, respectively, and paid the taxes due thereon as follows: For the year 1916 the sum of $9,639.73; for the year 1917 the sum of $221,187.44; and for the year 1918 the sum of $73,742.49. Of the sums so paid, $7,797.48 has been refunded for the year 1917, leaving a net payment of $213,389.96 for that year; and $5,056.57 has been refunded for the year 1918, leaving a net payment of $68,685.92 for that year. The payments were made on the following dates:

1916—June 12, 1917.

1917—June 12, 1918.

1918—In installments, the last of which was on December 15, 1919.

III. After the business which William S. Gray founded in 1880, and to which the plaintiff succeeded, had assumed large enough proportions so that responsible men were needed to handle it, it had been the practice to permit such men to share in the profits. This practice was continued by the

plaintiff so far as the officers and heads of departments were concerned. These latter were paid for their services fixed or drawing salaries and percentages of the profits.

IV. The percentages of the profits were fixed by agreement and in advance of the time the services were rendered.

On January 26, 1914, by resolution of the board of directors the contingent compensation for services for the future was to be as follows:

William S. Gray	60%
James J. Crawford	20%
William F. Hencken	10%
George A. Lane	5%
Arthur H. Smith	5%

"of the net profits after a dividend of 7 per cent per annum is paid to all stockholders of the company." After the passage of this resolution Mr. Dixon entered the service of the company and similar resolutions, with ratios as shown in Finding XIX, *infra*, were passed by the board of directors in January of and for the years 1916, 1917, and 1918, respectively.

During the years 1915–1918, inclusive, the board of directors consisted of William S. Gray, James J. Crawford, William F. Hencken, Georgia Gray Hencken, and Georgia C. Gray.

V. During the years 1916, 1917, and 1918 there were paid the said officers and heads of departments for their services fixed salaries and percentages of profits, as follows:

	Wm. S. Gray	J. J. Crawford	W. F. Hencken	A. H. Smith	C. G. Dixon	G. A. Lane
1916—Fixed	$12,000.00	$6,000.00	$3,120,00	$1,560.00	$1,560.00	$1,560.00
Contingent	245,714.30	81,904.70	40,952.40	20.476.20	20,476.20	20,476.20
	257,714.30	87,904.70	44,072.40	22,036.20	22,036.20	22,036.20
1917—Fixed	27,000.00	11.000.00	7,500.00	2,750.00	2,750.00	2,750.00
Contingent	112,083.00	37,361 00	18,680.50	9,340.25	9,340.25	9,340.25
	139,083.00	48,361.00	26,180.50	12,090.25	12,090.25	12,090.25
1918—Fixed	42,000.00	16,000.00	10,000.00	4,000.00	4,000.00	4,000.00
Contingent	42,000.00	14,000.00	7,000.00	3,500.00	3,500.00	3,500.00
	84,000.00	30,000.00	17,000.00	7,500.00	7,500.00	7,500.00

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Of the six men receiving percentages of profits only three were members of the board of directors, and each of these three rendered active and regular service in connection with his particular department, such active and regular service as to justify the amount of compensation paid them, including both fixed salaries and percentages of profits. The compensation so paid was for services as executives and not as directors.

VI. The fixed salaries were paid weekly, monthly, or credited and drawn against at will. The percentages of profit were paid as soon as the books for the year were closed and the amount of profits ascertained; and were charged to "expense" on plaintiff's books for the year in which the services were rendered, except for 1918 when they were charged by an outside accountant to profit and loss because that was the only account open on the books for 1918 at the time the entry was made.

The plaintiff's books were kept on an accrual basis.

VII. In its income-tax returns for 1916, 1917, and 1918 plaintiff deducted as "ordinary and necessary expenses" of its business the fixed salaries paid to the officers and heads of departments, but did not deduct the percentages of profits paid to its employees for their services. The total amounts which it so failed to deduct are as follows:



1916	$430, 000. 00
1917	196, 145. 25
1918	73, 500. 00

VIII. In all its income-tax returns filed prior to that of 1916 the plaintiff had deducted, as a part of the ordinary and necessary expense of its business, the percentages of profits paid to its officers or employees. It did not deduct them for 1916, 1917, and 1918 because an internal revenue agent in December of 1915, in making an audit of plaintiff's previous income-tax returns, had ruled that they were not deductible expenses, but must be treated as dividends. This ruling was accepted by plaintiff and no outside advice was sought. Additional taxes for the previous years based on it were assessed and paid.

IX. In 1920 Mr. Dixon, one of plaintiff's department heads, who in accordance with the aforementioned ruling

Reporter's Statement of the Case

of the Internal Revenue Department had returned the percentages of profits received by him for 1916, 1917, and 1918 as dividends, was notified by the department that they could not be treated as dividends but must be returned as salary, and he was compelled to pay an additional tax by reason thereof.

X. Feeling that the position of the department in respect to plaintiff's taxes seemed to be inconsistent with its position in respect to Mr. Dixon's, the plaintiff sought the advice of a firm of accountants as to whether plaintiff should not have deducted the percentages of profits paid by it to its employees in pursuance of the agreement between it and them as expenses during the years 1916, 1917, and 1918, and whether it was not entitled to a refund from the Government by reason of the noninclusion thereof among the deductions. It was advised that it was entitled to that deduction.

XI. A claim for credit for the excess tax paid as a result of the nondeduction of the percentages of profits paid Mr. Dixon for 1916 and 1917 was thereupon filed, amounting to $6,237.84, $409.52 of which was applicable to 1916 and $5,828.32 to 1917. Subsequently claims for refund for 1917 and 1918 were filed as follows:

1917—$41,296.63 (which does not include the $5,828.32 embraced in the claim for credit).

1918—$68,685.92.

XII. A claim for refund and credit based on the nondeduction of the percentages of profits paid to the officers and heads of departments other than Mr. Dixon was not filed at the time the other claims for refund were, because the time for filing claims for refund in respect to the 1916 taxes had expired.

XIII. The before-mentioned claims for credit and refund were in due course rejected by the Commissioner of Internal Revenue upon the ground that the payment of percentages of profits was a distribution of profits and not an allowable deduction from gross income as a business expense.

XIV. If the total amounts of the percentages of profits paid for 1917 and 1918, respectively, be deducted from gross

Reporter's Statement of the Case

income, plaintiff paid excessive taxes for those years as follows:

1917	$122,869.36
1918	37,799.49

XV. If any part of the percentages of profits paid to Mr. Dixon, or any other officer or head of department, for 1916 be deducted from gross income for that year, plaintiff paid excessive taxes for that year in excess of the amount sued for, viz, $409.52.

XVI. The claim for refund filed by plaintiff in respect to 1917 contained the following:

"6. Amount to be refunded (or such greater amount as is legally refundable), $41,296.63."

XVII. In the claim for refund for 1917 plaintiff did not specifically ask that the said sum of $122,869.36 be refunded, but it specified the amount as $41,296.63, because the accountant who prepared the claim for refund thought from his experience with the Bureau of Internal Revenue that it would not allow the total percentages of profits paid, but only a part thereof. The specific figure named in the claim for refund, together with the $5,828.32 included in the said claim for credit, represented the tax which this accountant computed the plaintiff had paid for 1917 in excess of the amount which it should have paid, had it deducted from its gross income as a business expense the sums which he thought, based on his experience, the Bureau of Internal Revenue would allow as salaries to the persons who received the contingent salaries.

XVIII. The number of shares of stock held by each of the respective persons to whom the percentages of profits were paid during 1916, 1917, and 1918 are as follows:

	1916	1917	1918
Wm. S. Gray	2,000	3,400	3,000
J. J. Crawford	150	500	500
W. F. Hencken	50	200	200
A. H. Smith		100	100
C. G. Dixon		100	100
G. A. Lane		100	100

The percentages of stock held by the recipients of the percentages of profits during 1916, 1917, and 1918 to the total stock outstanding were as follows:

	1916	1917	1918
	Per cent	*Per cent*	*Per cent*
Wm. S. Gray	80	68	60
J. J. Crawford	6	10	10
W. F. Hencken	2	4	4
A. H. Smith	----------	2	2
C. G. Dixon	----------	2	2
G. A. Lane	----------	2	2

XIX. The ratio which the respective percentages of profits bore to the total amount distributed by way of percentages of profits is as follows:

	1916	1917	1918
	Per cent	*Per cent*	*Per cent*
Wm. S. Gray	57.14	57.14	57.14
J. J. Crawford	19.04	19.04	19.04
W. F. Hencken	9.52	9.52	9.52
A. H. Smith	4.76	4.76	4.76
C. G. Dixon	4.76	4.76	4.76
G. A. Lane	4.76	4.76	4.76

The ratios which the total fixed and percentages of profits paid to each officer and head of department bore to the total amount of both fixed and percentages of profits are as follows:

	1916	1917	1918
	Per cent	*Per cent*	*Per cent*
Wm. S. Gray	56.54	55.65	54.72
J. J. Crawford	19.30	19.35	19.54
W. F. Hencken	9.66	10.48	11.07
A. H. Smith	4.84	4.84	4.89
C. G. Dixon	4.84	4.84	4.89
G. A. Lane	4.84	4.84	4.89

The percentages of profits were not based upon stockholdings or in proportion thereto.

XX. The total fixed and percentages of profits paid from 1913 to 1921, inclusive, to plaintiff's officers and heads of departments, and the average total of fixed salaries and per-

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centages of profits paid to them, respectively, during those years, are as follows:

	Wm. S. Gray	J. J. Crawford	W. F. Hencken	A. H. Smith	C. G. Dixon	G. A. Lane
1913—Fixed	$12,000.00	$4,800.00	----------	$1,560.00	----------	$1,560.00
Contingent	78,000.00	15,000.00	----------	6,000.00	----------	6,000.00
1914—Fixed	12,000.00	6,000.00	$3,120.00	1,560.00	$1,560.00	1,560.00
Contingent	45,000.00	15,000.00	7,500.00	3,750.00	500.00	3,750.00
1915—Fixed	12,000.00	6,000.00	3,120.00	1,560.00	1,560.00	1,560.00
Contingent	163,800.00	54,600.00	27,300.00	13,650.00	7,000.00	13,650.00
1916—Fixed	12,000.00	6,000.00	3,120.00	1,560.00	1,560.00	1,560.00
Contingent	245,714.30	81,904.70	40,952.40	20,476.20	20,476.20	20,476.20
1917—Fixed	27,000.00	11,000.00	7,500.00	2,750.00	2,750.00	2,750.00
Contingent	112,083.00	37,361.00	18,680.50	9,340.25	9,340.25	9,340.25
1918—Fixed	42,000.00	16,000.00	10,000.00	4,000.00	4,000.00	4,000.00
Contingent	42,000.00	14,000.00	7,000.00	3,500.00	3,500.00	3,500.00
1919—Fixed	22,500.00	13,500.00	9,000.00	6,000.00	6,000.00	6,000.00
Contingent	30,132.30	17,282.10	9,441.57	4,720.57	4,720.57	4,720.57
1920—Fixed	22,500.00	13,500.00	9,000.00	6,000.00	6,000.00	6,000.00
Contingent	None.	None.	None.	None.	None.	None.
1921—Fixed	15,000.00	10,000.00	6,250.00	5,000.00	5,000.00	5,000.00
Contingent	None.	None.	None.	None.	None.	None.
Total	893,729.60	321,947.80	161,984.47	91,427.02	73,967.02	91,427.02
Average	99,303.29	35,771.97	20,248.97	10,158.55	9,245.88	10,158.55

XXI. The par value of plaintiff's stock issued and outstanding during the years in question was as follows:

1916	$250,000.00
1917	500,000.00
1918	500,000.00

XXII. The dividends paid on the stock of the plaintiff during the years 1916, 1917, and 1918 were as follows:

	Per cent
1916	8
1917	6
1918	7

XXIII. During the years 1916, 1917, and 1918 the total amounts of business done by the plaintiff were as follows:

1916	$16,238,781.84
1917	17,184,110.48
1918	17,595,837.69

And during the same years the (1) income of the business after deductions of taxes and expenses (exclusive of all compensation to the aforesaid officers and employees), (2) the deductions for the fixed salaries paid them, (3) the deductions for dividends, and (4) the deductions for contingent

compensations to the said men, together with the successive remainders, A, B, and C, are as follows:

	(1) Income	(2) Fixed salaries	A (1) minus (2)	(3) Dividends	B A minus (3)	(4) Contingent compensation	C Remainder
1916	$507, 786. 47	$25, 800. 00	$481, 986. 47	$20, 000. 00	$461, 986. 47	$430, 000. 00	$31, 986. 47
1917	488, 941. 00	53, 750. 00	435, 191. 00	30, 000. 00	405, 191. 00	196, 145. 25	209, 045. 75
1918	296, 173. 77	80, 000. 00	216, 173. 77	35, 000. 00	181, 173. 77	73, 500. 00	107, 673. 77
Total	1, 292, 901. 24	159, 550. 00	1, 133, 351. 24	85, 000. 00	1, 048, 351. 24	699, 645. 25	348, 705. 99

XXIV. The persons to whom the percentages of profits were paid devoted all of their time to the plaintiff's business.

(a) Mr. Gray was the president of the company; initiated and directed its policies and conducted the general handling of the business. He had to make trips to Europe, sometimes as often as twice a year. As a result of his labors during 1916, 1917, and 1918 his health broke down and he was required to take a long rest.

(b) Mr. Crawford had been in the business for 30 years, was secretary of the plaintiff, general manager of the office, an executive under Mr. Gray, and attended to all of the credits, amounting on the average to 1,200 in number and $17,000,000 in amount. The plaintiff was responsible for all credits extended; that is to say, if any bill was uncollectible plaintiff had to bear the loss.

(c) Mr. Hencken was treasurer of the plaintiff and attended to all of the financing.

(d) Mr. Smith had charge of the accounting department and part of the sales. He had grown up with the business from a boy.

(e) Mr. Dixon had charge of part of the sales and was head of the wood-chemical, acetate-of-lime, and wood-alcohol departments. He has been with the plaintiff 12 or 13 years.

(f) Mr. Lane had charge of transportation and shipping and has been with the plaintiff 25 years.

Plaintiff depended entirely on the ability of these men to make business. Whether they were kept in plaintiff's employment depended upon the earnings they could make for

the company. The amount of profits depended upon their efforts and without them the company could not have done the business it did.

During the years 1916, 1917, and 1918 good men in the chemical business were hard to get. The men employed by plaintiff were exceptionally capable and had great responsibilities, and the shares of profits paid them were the moving cause of their continued employment with the company.

XXV. The total of fixed salaries and percentages of profits paid to each of the recipients thereof, respectively, was a part of the ordinary and necessary expenses of plaintiff's business, paid or incurred within the taxable year and was reasonable compensation for the services performed by each during the years in question under all of the circumstances, including the time and energy devoted to the work; their capabilities; the amount of business done by the plaintiff; the amount of profits; the dividends paid; the fact that the major part of the salaries was contingent upon profits; and the amounts paid in 1913, 1914, 1915, 1919, 1920, and 1921.

The fixed salaries were inadequate as compensation for the services rendered.

There is undisputed and reliable evidence that the compensation paid in 1918 was insufficient and that in one other company, manufacturing chemicals, larger compensation was paid and allowed, the three heads of the business each receiving $100,000 per annum, and these salaries were allowed by the Government in the company's tax return as part of the ordinary and necessary expense of the business.

XXVI. The moneys paid to the plaintiff's before-mentioned officers and heads of departments for 1916, 1917, and 1918 by way of percentages of the plaintiff's profits during those years, respectively, represented bona fide salaries or compensation for services rendered to the plaintiff by each of the persons to whom the payments were made, and were not paid for the purpose of evading taxation.

XXVII. The amounts which the plaintiff's accountants, in submitting the claim for refund for 1917, claimed the right to deduct on account of percentages of profits paid, and which are referred to in the letter written by one of plaintiff's attorneys to the Commissioner of Internal Reve-

nue while the claim for refund was pending, did not represent, together with the fixed salaries, the salaries or compensation to which the plaintiff's officers and heads of departments were respectively entitled for the services rendered by them during the years 1916, 1917, and 1918, but the amounts which it was thought by the said accountant and attorney the Commissioner of Internal Revenue would allow by way of adjustment or settlement of plaintiff's claims for excess taxes paid.

If the total amounts paid in 1917 and 1918, in both fixed and percentages of profits to Mr. Gray, Mr. Crawford, and Mr. Hencken (the only persons whose salaries are referred to in the before-mentioned letter as excessive from a tax standpoint), were unreasonably large, and the reasonable salaries were those stated in the said letter, then the plaintiff paid excessive taxes by reason of the nondeduction of the said latter sums from its gross income for those years, respectively, as follows:

1917	$47, 124. 95
1918	22, 926. 70

The court decided that plaintiff was entitled to recover the sum of $409.52, with interest thereon from June 12, 1917; and the further sum of $122,869.36, with interest thereon from June 12, 1918; and the further sum of $37,799.49, with interest on $13,379.05, part thereof, from December 15, 1919, and with interest on $18,435.63, another part thereof, from September 11, 1919, and with interest on $5,984.81, the balance thereof, from June 13, 1919, an aggregate of $161,078.37 with interest.

GRAHAM, *Judge*, delivered the opinion of the court:

The question involved is whether certain sums paid to the executive officers of the petitioner corporation and made up in part of fixed salaries and in part of percentages of net earnings, and deducted as ordinary and necessary expenses and reasonable salaries, should be allowed as expenses.

This case was originally heard and decided and judgment entered for the plaintiff for the amount claimed. Thereafter the defendant filed a motion for a new trial, and for

modification and change in findings, for additional findings and vacation of the judgment and dismissal of the petition. The motion for a new trial was allowed and the case remanded to the docket. It was argued and submitted on March 1, 1928, and on April 2, 1928, an order was entered suspending the final decision of the case until the decision of the *Botany Worsted Mills case*, 63 C. Cls. 405, which was at that time before the Supreme Court for hearing on certiorari. On January 2, 1929, the Supreme Court affirmed the decision of this court in the *Botany Worsted Mills case*, 278 U. S. 282, and dismissed the petition, grounding its decision upon the absence of certain elements or facts which it considered necessary to justify a recovery, which elements and facts are to be found in the findings in this case; so that the absence of facts necessary to a recovery in that case does not exist here, but on the contrary the necessary facts have been found, viz, that the apportionment of salaries to the directors was reasonable; that the value to the corporation of the services rendered was worth the proposed additional compensation; and the circumstantial facts necessary from which an inference could necessarily be drawn that the amounts paid were a part of ordinary and necessary expenses are existent here.

It clearly appears in this case that the compensation paid to the directors and heads of the departments by the plaintiff was a payment in good faith of compensation for valuable service rendered the corporation and was the cause which induced those receiving it to continue in the service of the plaintiff, and was neither unnecessary nor extraordinary, and justified the finding that it was a part of the ordinary and necessary expenses of the corporation.

The court, after argument of the motion for a new trial, considered and reviewed the evidence in the case and the objections to the original findings of fact, and has made additional findings of fact. The defendant introduced no evidence. The court has based its findings upon the evidence before it. As far as the witnesses testifying for the plaintiff are concerned, their intelligence, reliability, and qualifications have not been seriously questioned. As to the amount of the compensation in the case of each official, it

is a matter of common knowledge that compensation varies according to the opinion of those in control of a corporation as to the value of the services rendered, the volume of the business, amount of net earnings, and sometimes it is affected by locality and other considerations. So that there is no fixed and unalterable standard or yardstick by which the question of the reasonableness of the compensation in any particular case can be measured. Each case must stand upon the facts proved and the conclusion or inference that is to be drawn from those facts and all the circumstances of the case as to whether the amount paid, be it salary or a share of the profits, or both, was reasonable and should be regarded as a part of the necessary and ordinary expenses of the corporation.

The history of the dealings of the Bureau of Internal Revenue with this corporation is deserving of brief notice. The system or policy of paying a percentage of profits as compensation in addition to fixed salaries had been used by the plaintiff in the conduct of its business since 1913, and it had deducted these percentages as a part of ordinary and necessary expenses in its returns prior to the year 1916. It did not deduct them for the years involved here, 1916, 1917, and 1918, because an internal revenue agent in December, 1915, in making an audit of the plaintiff's previous tax returns, had ruled that they were not deductible expenses, but must be treated as dividends, which ruling was accepted by the plaintiff without seeking advice, and the additional taxes for the previous years based on this ruling were assessed and paid.

In 1920 Mr. Dixon, one of the plaintiff's department heads who received a percentage of the profits here involved, and who had in accordance with the aforesaid ruling returned the percentage received by him for the year 1916 as a dividend and not as salary, was notified by the bureau that it could not be treated as a dividend but must be returned as salary, and he was assessed and compelled to pay an additional tax by reason thereof. It will thus be seen that the Bureau of Internal Revenue, after holding that these percentages paid were not deductible as expense for salaries but were dividends for the years prior to 1916,

which holding had governed the corporation in payment of its taxes during 1916, 1917, and 1918, reversed itself in the case of Mr. Dixon and held that they were not dividends but salary. The plaintiff thereupon, being apprised of this action in Mr. Dixon's case, sought advice, and was advised that the percentages paid were salaries and deductible as expenses during the years 1916, 1917, and 1918. In accordance with this advice, claim for a refund was filed, and on its refusal this suit was brought.

Thus it appears that the Bureau of Internal Revenue in this case changed its ground and reversed its judgment on the same facts, its final judgment being in conflict with the judgment of the directors of the petitioner corporation.

The findings show that the salaries and percentages paid here were not paid to the parties receiving them simply because they were officers and directors of the corporation, but for services rendered. The mere size of the salary is not a matter for our consideration and, under the law, can not be determinative. The question is, taking the amounts received and viewing them in the light of all the proved facts, whether those paid for 1916 and 1917 for services rendered can be properly treated as part of the "ordinary and necessary expenses" of the corporation, and those for 1918 as reasonable salaries, so reasonable as to justify their being treated as part of the ordinary and necessary expenses of the corporation.

The policy of agreeing to pay a percentage of the earnings before they are earned, or even a sum in the nature of a bonus after they are earned, is based primarily upon sound business principles. It stimulates the activity, diligence, and ambition of the employees in the case of a percentage of the profits, and in both the case of a percentage and of a bonus it enables the corporation to justly compensate its employees without beforehand incurring the obligation. There is, however, nothing in this case to indicate a bonus. These salaries were agreed upon in January of the current year in which they were earned. Nor is there anything to show that they were intended as dividends, as they are not based upon the stockholdings of the parties to whom they were paid, and the Bureau of Internal Revenue did not so hold, but treated the percentages paid as a distribution of profits. In the year

1916 three of the parties were not even stockholders. The action of the board of directors under ordinary circumstances in fixing the salaries raises a fair presumption of reasonableness in such case, and this presumption is the stronger in this case because the practice of compensating on what may be called a contingency was a settled policy of the corporation extending over a period of years prior to the years in question here and after these years, and in each year it was based upon the profits for that year. If the profits were small, the sum realized from the percentage was small, and if the profits were large, the sum so realized was larger, depending in each year upon the loyalty, vigilance, and intelligent effort, and the stimulated ambition of each of the parties. The success of the business was largely due to the individual efforts of these men, and the diligence they displayed and attention they gave to the particular branch of the business allotted to them. Its earnings did not depend upon the activities and efforts of a large number of subordinates.

The increase of the percentages as shown in different years can be readily understood from the well-known fact that there have been increases in salaries and compensation in almost every line of business and industry owing to the increased cost of living.

Every business is largely dependent upon the capacity, resourcefulness, and assiduity which its executive officers personally give to it, and particularly that part of it especially entrusted to them; and this is particularly true as to a business such as the petitioner's.

The applicable provisions of the statutes involved are section 12 (a)[1] of the revenue act of 1916, 39 Stat. 767, and section 234 (a)[2] of the revenue act of 1918, 40 Stat. 1057, 1077.

[1] SEC. 12. (a) In the case of a corporation, * * * such net income shall be ascertained by deducting from the gross amount of its income received within the year from all sources—

First. All the ordinary and necessary expenses paid within the year in the maintenance and operation of its business. * * *

[2] SEC. 234. (a) That in computing the net income of a corporation subject to the tax imposed by section 230 there shall be allowed as deductions:

(1) All the odinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered, * * *.

Section 234 (a) of the revenue act of 1918, *supra*, provides that the "ordinary and necessary expenses" should include the "reasonable allowance for salaries or other compensation for personal services actually rendered." It will be seen that the reasonable allowance under the statute can be either by salaries or by other compensation—i. e., a percentage of profits as in the case at bar—and that it must be for personal services actually rendered. The findings in this case show that it was for personal services actually rendered. As to this there can be no dispute. The question therefore turns upon whether the amount paid was a reasonable allowance, and it has been so found in the findings.

It has been further found that it was such a reasonable allowance as to justify its inclusion as a part of the "ordinary and necessary expenses," for which a credit should be allowed.

This is decisive of the case, and it might be left here. However, it seems advisable to elaborate it somewhat further.

The opinion of the Supreme Court in the *Botany Worsted Mills case* stated and epitomized what elements and facts were wanting in that case to entitle the plaintiff to recovery. They were stated in the following language:

"The findings do not show the nature or extent of the services rendered by the board of directors or its individual members, either as directors, executive officers, or department managers—the amounts apportioned and paid to each director—the basis of apportionment, whether the nature and extent of their individual services, the amount of their stockholdings, or otherwise—the value of their services—or the reasonableness of the purported compensation."

It is clear that the Supreme Court did not hold in this case either that the size of the amount paid would prevent its being treated as ordinary and necessary expenses, or that the mere fact that a part of the compensation was in the form of percentage of profits would affect the recovery. The difficulty in that case, as pointed out by the court (p. 290), was that this court did not find "that the amount disallowed by the commissioner constituted a part of the ordinary and necessary expenses of the mills. The findings are silent as

to this ultimate fact—essential to a recovery by the mills—and only show certain circumstantial facts relating to the payment made to the board of directors." The findings in this case completely dispose of this objection. As stated, they find that the amount disallowed by the commissioner constituted a part of the ordinary and necessary expenses. In other words, "the ultimate fact" to which the Supreme Court alludes is found in this case.

What may be an ordinary and necessary expense for salary in a given corporation may vary from year to year, the variance being controlled by the fluctuating conditions of business generally and of the business itself and of the management. It also varies in different corporations, and sometimes in identical corporations engaged in the same business, located at the same place, and practically under the same management, it being in the end largely controlled by the human element involved—i. e., the capacity, judgment, and diligence of those who control its operations.

It therefore becomes necessary in order to pass upon the question of the reasonableness of the amount paid and whether it can properly be treated as a part of the ordinary and necessary expenses, to consider somewhat in detail the character of the plaintiff's business, the character of the officials it employed, the value to it of the services rendered, the conditions under which they were employed, and the results.

It is undisputed that the plaintiff's business was a peculiar one. Possibly the word "unique" describes it better, since the evidence discloses that there was probably not another like it in the United States. It had been built up by the president of the company, Mr. Gray, and was engaged in the business of a broker in chemicals and also as an exporter and importer of chemicals. Therefore, it is necessary to consider, first, the character, ability, and capacity for the work of the men employed. It is undisputed that they were most capable men for their work in their respective departments, and that it was necessary to pay them more than the fixed salaries in order to secure and retain their services; that the success of the business was due to their superior service and diligence; that they could have earned as much or more

outside of the business; that Mr. Gray, who controlled the business, had adopted it as a part of his policy extending over many years prior to the years involved here and subsequent thereto, of basing a portion of the compensation on the contingency of the earnings in order to stimulate the interest and activities of these assistants whose compensation is in dispute here. It will thus be seen that this policy was a part of the business, was regarded as, and actually was, necessary for its success and did contribute to its success, and so can fairly be said to have been an element in determining the ordinary and necessary expense of the business. The men were worth to the business the compensation paid them. They could not be retained without it and the business would have suffered had they severed their connection with it. Their retention was necessary to its success, and the success was due to their efforts, and the arrangement as to percentages of profits had been made in good faith. There is nothing in the record to even suggest that this was an effort to avoid taxation.

The volume of business was greatly developed from year to year until it reached a peak in 1916. Thereafter its earnings grew less, and as the earnings increased their compensation increased, and as the earnings decreased their compensation decreased. Falling off of the earnings was due to the peculiar business conditions of the period. It is clear from all the circumstances surrounding this corporation that the reasonableness of the salaries of all except Mr. Gray, the president, does not require any further discussion. They were not only reasonable but were based upon contract entered into before the compensation was earned, and could not be withdrawn during the year they were being earned, until after the net profits had been determined, when they had a legal right to their respective percentages. These were not bonuses or gratuities, they were not based upon the stockholdings of each, and were not dividends. They were a part of compensation earned under contract, and compensation earned for each particular year, the amount of which was not known in advance but depended upon their exertions and management of the business for the year.

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It seems advisable, inasmuch as Mr. Gray's percentage of the profits was larger than the others, amounting to about 57½%, that some special comment should be made in connection with it. As to the amount paid Mr. Gray, while for 1916 it was large, for 1918 it was $84,000. There is undisputed testimony to the effect that the compensation paid in 1918 was insufficient and that in one other company, manufacturing chemicals, larger compensation was paid and allowed, the three heads of the business each receiving $100,000 per annum, and these salaries were allowed by the Government in the company's tax return as part of the ordinary and necessary expense of the business. Mr. Gray's aggregate salary for the year 1913 up to and through the year 1921 was about $99,000. We are of opinion, therefore, that it has been shown that all of the compensation paid here and involved in the refund claimed was reasonable and was a part of the ordinary and necessary expenses of the corporation, and the court has so found in its findings of fact.

In a footnote [3] is a list of cases, among a number, which have been considered by the Board of Tax Appeals, showing the varying percentage, and high percentage, of net income which has been allowed as reasonable compensation as a part of the ordinary and necessary expenses of the respective corporations. It varies from 46% to 295%. The average of the allowances in these cases is about 110%. The highest percentage paid Mr. Gray was 57½%.

In the *Francesconi & Co. case*, cited in footnote, 217% was disallowed by the commissioner. The Board of Tax Appeals set aside the disallowance and allowed 217%.

[3] *Webb & Bocorselski, Inc.*, 1 B. T. A. 871, 46% allowed by commissioner and about 71% by Board of Tax Appeals;
McMillan Metal Co., 2 B. T. A. 797, 79% allowed by commissioner and about 87% by board;
Record Abstract Co., 2 B. T. A. 628, 59% allowed by commissioner, approved by board;
Brown & Brown, Inc., 10 B. T. A. 106, 67% allowed by commissioner, approved by board;
Strayer's Business College, 10 B. T. A. 573, 74% allowed by commissioner and approved by board;
Francesconi & Co., 10 B. T. A. 658, salaries disallowed by commissioner, board allowed 217%.
H. V. Greene Co., 5 B. T. A. 442, 449, 450, compensation in form of commissions disallowed by commissioner, board allowed about 295%.

Opinion of the Court

In *Livingston & Co.* v. *United States*, 67 C. Cls. 626, the commissioner allowed, and this court approved, the salaries for 1920 of $70,000, out of net earnings of $102,852.54, and in 1921 salaries of $50,000 out of net earnings of $79,875.99. This court held that these allowances were not unreasonable under the circumstances.

In the case of *Seinsheimer Paper Co.* v. *United States*, 63 C. Cls. 429, for the year 1917 the commissioner allowed, and this court approved, salaries of $50,000 out of net earnings of $75,569.38, in 1918 salaries of $50,000 out of net earnings of $68,220.30, and in 1919 salaries of $50,000 out of net earnings of $25,176.53.

While the net income in this case for 1916 after payment of fixed salaries and dividends was $461,986.47, and the amount of contingent compensation was $430,000, representing something like 93%, yet in the year 1917 the percentage was less than 50%, and in 1918 it was about 40%.

In the instant case the total net earnings for the three years, inclusive of fixed salaries and contingent compensation, amount to $1,292,901.24, and the amount paid out as salaries and percentage is $859,195.25, which makes an average for the three years of 67% of the net earnings. As stated, the defendant offered no evidence in this case.

Counsel for the defense quote as authority for their contention the case of *Twin City Tile & Marble Company* v. *Commissioner*, U. S. Circuit Court of Appeals, Eighth Circuit, opinion handed down March 25, 1929 [32 Fed. (2d) 229.] Prentice Hall Federal Tax Service, Report 13, p. 689. We do not think that case authority here. The facts were very different. The court distinctly held:

"The question here really is not concerned with what is a reasonable salary. The evidence shows a distribution of dividends under the guise of salaries."

In that case the distributions were based solely upon the amount of common stock holdings. The court further says:

"The increases were based solely upon the amount of common stock holdings and out of all proportion and in no wise based upon the character or amount of services rendered."

And further:

"* * * The increases were effective without respect to the net sales of the company."

The original findings of fact and opinion are withdrawn and new findings made; the original judgment is vacated and set aside and a new judgment entered in accordance with the conclusion of law and this opinion.

WILLIAMS, *Judge*, and LITTLETON, *Judge*, did not hear and took no part in the decision of this case.

GREEN, *Judge*, and BOOTH, *Chief Justice*, concur.

HARRY R. CARROLL AND LOUIS D. CARROLL, PARTNERS TRADING UNDER THE FIRM NAME OF CARROLL ELECTRIC CO., v. THE UNITED STATES

[No. C-923. Decided December 2, 1929]

On the Proofs

Contracts; delay in preparatory work; proof of breach by Government.—Where it is not shown that delay in preparatory work is a breach of the contract upon the part of the Government, the Government is not liable in damages therefor to a contractor who is put to additional expense over that which he would have incurred had he been able to proceed with the work at the agreed time.

Same; mutual delays; liquidated damages; lack of fixed date for completion.—See *Standard Steel Car Co.* v. *United States*, 67 C. Cls. 445.

Same; refusal to sign general release; withholding compensation. See *McClintic-Marshall Co.* v. *United States*, 59 C. Cls. 817.

The Reporter's statement of the case:

Mr. George R. Shields for the plaintiff. *King & King* were on the briefs.

Mr. Ralph C. Williamson, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. Arthur J. Iles* was on the briefs.

The court made special findings of fact, as follows:

I. Plaintiffs, Harry R. Carroll and Louis D. Carroll, are copartners doing business under the firm name of Carroll Electric Company, and were so engaged at all of the times involved in this suit.

II. On the 7th day of March, 1919, plaintiffs entered into a contract with the United States whereby they undertook and agreed to furnish all labor and certain materials necessary for the installation and to install in the central power plant at the naval operating base, Hampton Roads, Virginia, four 600 H. P. boilers with engines for the same and equipment including mechanical stokers and other devices in connection with certain equipment furnished by the Government in accordance with certain specifications. A copy of the contract is attached to the petition of plaintiffs as Exhibit A, part 1; the specifications are attached to the petition of plaintiffs as Exhibit A, part 2; and general provisions forming part of the specifications are attached to the petition of plaintiffs as Exhibit A, part 3. All of the said parts of Exhibit A are by reference made a part hereof. The boilers, engines, equipment, etc., were to be furnished by other contractors, and the building in which they were to be installed was also to be furnished by another contractor.

III. Under the provisions of the contract, the work referred to therein was to be completed with 120 calendar days from the date when a copy of the contract was delivered to plaintiffs, which was March 31, 1919. The work was in fact completed September 3, 1920.

This delay in completion was caused by the failure of the Government to have the power-house building, in which the work was to be done and the machinery and equipment installed, in readiness for such work and installation, and also by the failure to have ready the materials and equipment which the Government was required by the contract to supply, the plaintiffs having acted with reasonable diligence in the performance of the contract on their part. The construction of the said building had not even been started when the 120 days referred to in the contract had expired, except some work in the way of driving piles for the foundation. The contract did not specify when the building should be com-

pleted or the equipment furnished by the Government, and it was not until January 12, 1920, that the construction work on the building had progressed to a point where the plaintiffs could commence the work, and from that date until the final completion on September 3, 1920, plaintiffs were able to proceed intermittently with the work. The work could be commenced on the completion of the building, and if there had been no delay on the part of the Government with reference to the construction of the building and furnishing the equipment as required by the contract, the plaintiffs could have completed the work within the time specified in the contract.

IV. The cost of labor to plaintiffs in the performance of their work under the contract was largely in excess of what it would have been had the work been performed within the contract period, due to the increased cost of labor during the period of performance of the contract over the cost of labor during the period provided by the contract for performance. The additional cost of the labor to the plaintiffs due to the delay in providing the building and materials, as hereinbefore described, amounted to $1,305.69. The evidence does not show whether this delay was the fault of the Government, or of the other contractors, or what caused it.

V. The pay rolls of the plaintiffs show the employment of a superintendent on the work at a total cost of $1,626.43. The superintendent was paid at the rate of $46.86 per week. Had the plaintiffs been able to complete their work within the time provided by the contract, it would have been necessary to expend only $796.62 for superintendence of the work on the contract in suit.

VI. As a result of the delay on the part of defendant, shown in the foregoing findings, it became necessary for plaintiffs to erect a shed for the storage of equipment awaiting time when it could be installed. This storage shed cost plaintiffs $300.00, which was a reasonable sum. That expenditure would not have been necessary on the part of plaintiffs had the other contractors for the Government performed their part of the contract in time for the plaintiffs to perform their work as contemplated by the contract.

Reporter's Statement of the Case

VII. There is no evidence to sustain the claim made by plaintiffs for an additional bond premium.

VIII. A partial settlement was made under the contract in suit in which the defendant withheld the sum of two per cent of the amount admitted to be due the plaintiffs, amounting to $77.98, and the plaintiffs reserved a claim then pending for additional compensation totaling $3,898.92.

IX. Paragraph 13 of the general provisions of the contract, and paragraph 12 of the specifications also forming a part of said contract, provided that in case the work was not completed within the time specified in the contract, or within such extension of the contract time as might be allowed, the Government should be entitled to liquidated damages at the rate of $60.00 per calendar day for the period of delay, and the defendant has filed a counterclaim herein whereby it seeks to recover from the plaintiffs the sum of $5,640.00 for the last ninety-four days of the delay in completion of the work at the rate of $60.00 per day.

On October 3, 1921, the following letter was written by C. W. Parks, Chief of the Bureau of Yards and Docks of the Navy Department:

3328.

NAVY DEPARTMENT,
BUREAU OF YARDS AND DOCKS,
Washington, D. C., October 3, 1921.

From: Bureau of Yards and Docks.
To: Commandant, Naval Operating Base, Hampton Roads, Norfolk, Virginia.
Subject: Contract No. 3328 (Dept. No. 2384), March 7, 1919, of Carroll Electric Company for mechanical equipment and piping, central power plant, Naval Operating Base.—Settlement.

1. The contract, dated March 7, 1919, required performance within the 120-day period ending July 27, 1919. The work, including all changes, was completed September 1, 1920. Owing to the unreadiness of the building, it was not possible for the contractors to proceed with their work until January 12, 1920 (nearly six months after the expiration of the contract period), and further hindrances from the same cause were also encountered subsequently. In the circumstances the contractors are not regarded as chargeable with damages as for delay, and final payment without de-

ductions as liquidated damages is authorized, subject to release of claims.

2. Should the contractors desire to reserve claims from the release, as is understood to be the case, this may be done in consideration of a deduction from the contract price of 2 per cent of the amount of the reserved claims.

3. It is understood that the contractors are to make good any defects that inspection and test of the apparatus may show to exist, for which they may be responsible under the terms of the contract.

C. W. PARKS.

It appears from the evidence that plaintiffs asked for certain extensions which were granted, and defendant admits that these extensions covered all but the last ninety-four days of the contract. There was no formal application for extension of the last ninety-four days of the delay and the evidence fails to show that it was granted.

X. The specifications attached to the contract provided, among other things, that "in the event of the work not being completed within the time allowed by the contract, said work shall continue and be carried on according to all the provisions of said contract, * * *."

It also provided that "in case the work is not completed within the time specified in the contract, or within such extension of the contract time as may be allowed," deductions should be made from the contract price to be computed in the manner provided therein, but the contractor was not to be liable for unavoidable delays, and it was provided that "delays caused by acts of the Government will be regarded as unavoidable delays." It further provided that extensions of time might be granted for the completion of the work on application of the contractor to the officer in charge, and that neglect to apply therefor should constitute a waiver of the right to an extension; and further that "the contractor agrees to accept the finding and action of the Navy Department, Bureau of Yards and Docks, in the premises as conclusive and binding."

The contract further provided that "the contractor shall be responsible for the entire work contemplated by the contract * * * and property of every description used in connection therewith."

The Government also reserves "the right to make such changes in the contract, plans, and specifications as may be deemed necessary or advisable"; and it was further provided that "the contract price shall cover all expenses, of whatever nature or description, connected with the work to be done under the contract."

The court decided that plaintiffs were entitled to recover $77.98.

GREEN, *Judge*, delivered the opinion of the court:

The evidence shows that the plaintiffs contracted with the defendant to install certain mechanical equipment in a building to be constructed by the Government, at Hampton Roads, Virginia. The contract was dated March 7, 1919, and was to be completed within 120 days from the date a copy of the contract was delivered to plaintiffs, which was July 29, 1919. The work in fact was not completed until September 3, 1920, due principally to delay on the part of other contractors in completing other necessary preliminary work.

Plaintiffs bring this suit to recover a small unpaid balance withheld from the contract price, and also damages which they claim to have sustained by reason of the delay on the part of the Government, which damages consist in increased wages paid to employees and the cost of the construction of a building made necessary by the delay, as plaintiffs allege, to protect the material which they had purchased to use in carrying out the contract. The Chief of the Bureau of Yards and Docks, Navy Department, made a finding on the question of delay favorable to the plaintiffs (see his letter in Finding IX), and the contract contained a provision as to the effect of his findings, which is claimed by the plaintiffs to be conclusive in their favor.

We do not need to determine the effect of the findings of the Bureau of Yards and Docks for the evidence, as a whole, shows that the delays were all, or nearly all, caused by the failure of the defendant to have ready for the plaintiffs the construction and equipment which, under the contract, it was its duty to provide. Cases are cited by counsel for plaintiffs from our previous decisions which hold the Gov-

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ernment liable in cases where it has caused damage by delay in complying with its part of the contract. That such a liability may arise is well settled, but we held in *Carroll Electric Co.* v. *United States*, 67 C. Cls. 513, that "the fact that the Government caused delay and damage in the performance of the work is not by itself and alone sufficient to make the Government liable," and also "the true principle is that the acts of the Government or its omission to act, even though they caused delay, will not make the Government liable in damages unless they constitute also some breach of the contract, either express or implied."

In this case the contract contemplated delays, and provided that in such event the contractor should proceed with the work. Nevertheless, we think that there was an implied obligation by the Government to perform its part of the contract within a reasonable time, the period which this reasonable time would cover of course depending on all the circumstances connected with the performance of these obligations. But granting all this, we are left in the dark by the evidence as to what would have been a reasonable time under the circumstances, because we have no evidence as to what the circumstances were. They might have been such as to give the Government no excuse, or an excuse for part of the time, or possibly all of the delay. All the evidence shows with reference to the circumstances is that there were other contractors who were to perform the preliminary work which it was necessary to complete before plaintiffs could proceed with their part of the contract. There was delay in performing this preliminary work, but whether the fault was on the part of the Government in respect to letting the contracts, or with these other contractors in performing the preliminary work, or what it was that caused the delay, does not appear from the evidence; and there is nothing in the evidence that would justify us in finding that so far as the Government was concerned the delay was unreasonable. It may be contended that the delay was of such length, considering the fact that there was nothing special or unusual in what was required on the part of the Government, a court might hold as a matter of law that so long a delay was unreasonable. Conceding for the sake of the argument only

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that this might be done, we still have no evidence which would fix the date after which the delay became unreasonable. We must therefore conclude that the evidence fails to show a breach of the contract in this respect on the part of the defendant.

The case at bar is very similar in its facts to the case of *H. E. Crook Co.* v. *United States*, 59 C. Cls. 593, and 270 U. S. 4, in which there was about the same number of days delay, causing the plaintiff to pay several thousand dollars increase in wages. In that case the Supreme Court said:

"But the only reference to delays on the Government side is in the agreement that if caused by its acts they will be regarded as unavoidable, which though probably inserted primarily for the contractor's benefit as a ground for extension of time, is not without a bearing on what the contract bound the Government to do. Delays by the building contractors were unavoidable from the point of view of both parties to the contract in suit. The plaintiff agreed to accept in full satisfaction for all work done under the contract the contract price, reduced by damages deducted for his delays and increased or reduced by the price of changes, as fixed by the Chief of the Bureau of Yards and Works. Nothing more is allowed for changes, as to which the Government is master. It would be strange if it were bound for more in respect of matters presumably beyond its control. The contract price, it is said in another clause, shall cover all expenses of every nature connected with the work to be done."

The language of the Supreme Court applies with equal force to the case at bar in which not only the facts but the provisions of the contract with reference to changes, and the contract price covering all expenses, were substantially the same as in the *Crook case, supra*, where the holding was that the plaintiff was not entitled to recover, and in which the decision of the Supreme Court is to the effect (as shown by a part of the opinion not quoted) that there was no breach of the contract on the part of the Government.

Plaintiffs also seek to recover the cost of a small building erected to preserve materials and equipment which they had purchased and brought to the place where they were to be used, but were unable to use the same at the time when they were brought by reason of delay on the part of the Government. There is no doubt under the evidence as to the

Syllabus

delay on the part of the Government having made the building necessary and there is no dispute as to its cost and value, but here again plaintiffs' recovery must depend, like that upon the item last above discussed, upon whether there was an implied contract fixing a time for the Government to complete its part of the contract, and if so, whether the evidence shows the date as to which this completion was to be effected. On these questions the rules above set forth must be applied with the result that plaintiffs are denied the right to a recovery.

The evidence entirely fails to sustain plaintiffs' claim for damages on account of extra premium paid on bond. This leaves nothing which plaintiffs can be allowed except the sum of $77.98, withheld from the contract price, which, under the facts in the case and repeated decisions of this court, was wrongfully withheld in making settlement.

Defendant presents a counterclaim for liquidated damages by reason of the failure of plaintiffs to complete the work within the specified time and extensions granted. This claim does not merit discussion. Defendant can not recover for delays caused by its own default, and even if some of the delay was caused by plaintiffs the evidence does not show how much, and the court will not undertake to apportion it. See *Standard Steel Car Co.* v. *United States*, 67 C. Cls. 445.

In accordance with the views above expressed, the plaintiffs will be awarded judgment for $77.98.

WILLIAMS, *Judge;* LITTLETON, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

AMALIE HIRSH AND WILLIAM A. HIRSH, EXECUTORS OF THE WILL OF MORRIS M. HIRSH, DECEASED, v. THE UNITED STATES

[No. E–284. Decided December 2, 1929]

On the Proofs

Estate-transfer tax; transfer of securities by decedent for purchase of annuity.—Where decedent six months prior to his death by agreement therewith transferred to each of his children securities of a specified value, stating that such transfer was a gift

Reporter's Statement of the Case

"save such amount as is a reasonable and proper consideration for the payment of" a designated annuity to his wife and in case he should survive her, to himself during his own life, and the transferees agreed to pay such annuity, the transfers so made divested the decedent of control over the property conveyed and of the terms and conditions of the annuity, and the value of the annuity formed no part of the decedent's estate taxable under the Federal estate-transfer tax law.

The Reporter's statement of the case:

Mr. Clarence N. Goodwin for the plaintiffs. *Goodwin, Bresnahan & Johnston* were on the briefs.

Mr. Fred. K. Dyar, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. Ottamar Hamele* was on the briefs.

The court made special findings of fact, as follows:

I. Plaintiffs at all times herein mentioned on and since the date of their appointment, July 9, 1920, were and still are the duly appointed and qualified executors of the estate of Morris M. Hirsh, deceased, late of the city of Chicago, county of Cook, and State of Illinois. Said deceased died on April 29, 1920.

II. Plaintiffs as such executors on or about April 29, 1921, pursuant to section 404 of the revenue act of 1918, filed a return for the Federal estate tax, on Treasury Department Form 706, for said estate. Said return showed a total estate tax due to the United States of $9,809.15, which was paid to the collector of internal revenue at Chicago, Illinois, at the time of filing said return.

III. On or about November 1, 1919, decedent transferred by gift to his wife certain securities of the approximate value, on said date, of $200,000.00, which transfer and its value were set forth in Schedule E of said estate tax return but were not included in decedent's gross estate.

IV. On or about November 1, 1919, Morris M. Hirsh, the decedent, entered into four separate agreements, copies of which are annexed to petition herein and made a part hereof by reference, one with each of his four children, identical except as to their respective names, all bearing date, November 1, 1919. Each of said agreements recited decedent's

desire to make a gift of $50,000.00 to the child therein named "save and extent to the amount necessary to purchase an annuity to be paid by" (naming the child with whom the agreement was made) to decedent's wife, "Amalie Hirsh of the sum of two thousand dollars ($2,000.00) for and during each year of the life of Amalie Hirsh, namely, one thousand dollars ($1,000.00) on the first day of May and one thousand dollars ($1,000.00) on the first day of November of each year hereafter; and if Morris M. Hirsh should survive said Amalie Hirsh, then a like sum of money on the first day of May and November of each year after the death of said Amalie Hirsh for and during the life of Morris M. Hirsh." The agreement continued,

"*Now, therefore*, it is agreed that in consideration of the transfer of securities of the value of fifty thousand dollars ($50,000.00) by said Morris M. Hirsh to said" (naming the child with whom such agreement was made), "the amount of which save such amount as is a reasonable and proper consideration for the payment of the annuity hereafter mentioned is hereby paid over and transferred as a gift."

The child named respectively in each of said four agreements then thereby agreed "to pay to said Amalie Hirsh, on the first day of May and on the first day of November of each year hereafter, only, however, that said Amalie Hirsh is then living, the sum of one thousand dollars ($1,000.00); and should Morris M. Hirsh survive said Amalie Hirsh then in such case said" (naming the child with whom the agreement was made) "agrees to pay after the death of said Amalie Hirsh to said Morris M. Hirsh on the first day of May, and on the first day of November of each year thereafter, only, however, that said Morris M. Hirsh is then living, the sum of one thousand dollars ($1,000.00)."

These four agreements were all signed by Morris M. Hirsh and one by each of the children with whom each agreement was separately made, respectively. Pursuant to these agreements, securities of the value of $50,000.00 were transferred to each of decedent's four children—an aggregate of $200,000.00. The value of the securities transferred to the children as aforesaid was at the time of said transfer and

of the decedent's death $200,000.00, and the rate of interest in the securities so transferred was 6 per cent per annum.

Morris M. Hirsh, the decedent, was born March 1, 1837. Amalie Hirsh, his widow, was born July 12, 1843.

At the time the said contracts of November 1, 1919, were made, each of the said children was financially able, in his or her own right, to pay the agreed annuity, regardless of said securities.

V. The executors did not include the value of any of said transfers in decedent's gross estate in said estate tax return.

VI. Upon an audit and review of the said estate tax return the Commissioner of Internal Revenue included in decedent's gross estate the value of the gift of $200,000.00 made by decedent to his wife and the value of the securities—$200,000.00—transferred to decedent's four children ($50,000.00) each as aforesaid, and assessed an additional tax of $30,291.28, making a total estate tax of $40,100.43.

VII. On February 26, 1923, said executors filed with the collector of internal revenue a claim of $26,150.11 in abatement of said tax.

VIII. The commissioner determined that decedent did not make any of the transfers above-mentioned in contemplation of death; that no reservation of any kind was made in the gift of $200,000.00 to decedent's wife; that such gift was absolute and the value thereof was not taxable.

IX. The commissioner, however, held that the transfer of securities of the aggregate value of $200,000.00 under the four agreements made by decedent with his four children was in part a transfer intended to take effect in possession or enjoyment at or after the death of Morris M. Hirsh within the meaning of section 402(c) of the revenue act of 1918 and that the value, at the date of death, of the interest so transferred was $133,333.33 (this being the principal sum which invested at 6% would produce an annuity of $8,000.00 per annum, and that this value, to wit, $133,333.33, instead of $200,000.00 should be included in the value of the gross estate by reason of said transfers to the said children.

X. On September 8, 1924, the commissioner notified the executrix by letter of such determination and in said letter

rejected said claim in abatement to the extent of $8,000.00 with the following explanation:

"In the review of January 23, 1923, the gross estate was determined to be $961,365.13; the deductions, $103,859.81; and the net estate, $857,505.32. The reductions made in connection with the item protested, and affecting the value of the gross estate amount to $266,666.66, making the corrected total thereof $694,698.47. The deductions remain unchanged. The resultant net estate is accordingly now determined to be $590,838.66, the tax upon the transfer of which is $21,950.32. As the estate has satisfied a tax of $9,809.15, upon the basis of the return, there was due an additional tax of $12,141.17. As the additional tax determined on review amounted to $30,291.28 and is excessive in the sum of $18,150.11, your claim for abatement of $26,150.11 will be prepared for allowance in the sum of $18,150.11, and is rejected as to $8,000."

XI. On October 3, 1924, plaintiffs paid under protest to the collector of internal revenue at Chicago, Illinois, the rejected portion of said claim for abatement in the sum of $8,000.00, with interest thereon at the rate of 10 per centum per annum from March 1, 1923, to October 3, 1924, amounting to $1,275.62.

XII. Said additional assessment was made by the commissioner under section 402(c) of the revenue act of 1918.

XIII. On or about February 6, 1925, plaintiffs filed a claim for a refund of said sum of $8,000.00, the additional tax, and the interest of $1,275.62, amounting in all to the sum of $9,275.62, under the provisions of the revenue act of 1918, on the form prescribed by the Treasury Department.

XIV. On March 19, 1925, the Commissioner of Internal Revenue rejected said claim for refund in its entirety on the ground upon which the claim in abatement had been rejected in part and that no new matter or evidence had been presented.

XV. It is further stipulated and agreed, by and between said counsel for the parties hereto, that if the court renders judgment herein for the plaintiffs upon the facts set forth in said petition, no judgment shall be so rendered in excess of the sum of nine thousand two hundred seventy-five dollars and sixty-two cents ($9,275.62) and interest thereon to which said court may determine plaintiffs are entitled.

The court decided that plaintiffs were entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

This is an action by executors to recover an estate tax of $9,275.62, with interest, paid by them under protest. Their application for refund was seasonably made, but was rejected by the Commissioner of Internal Revenue. Plaintiffs' decedent, Morris M. Hirsh, died on April 29, 1920.

About six months prior to his death the decedent had entered into four separate agreements, one with each of his four children, three daughters and a son, all bearing date November 1, 1919, and identical except as to name. Each of said agreements recited decedent's desire to make a gift of $50,000 to the child therein named "save and extent to the amount necessary to purchase an annuity to be paid by" (naming the child with whom the agreement was made) to decedent's wife, "Amalie Hirsh, of the sum of two thousand dollars ($2,000) for and during each year of the life of Amalie Hirsh, namely, one thousand dollars ($1,000) on the first day of May and one thousand dollars ($1,000) on the first day of November of each year hereafter; and if Morris M. Hirsh should survive said Amalie Hirsh, then a like sum of money on the first day of May and November of each year after the death of said Amalie Hirsh for and during the life of Morris M. Hirsh." The agreement continued,

"*Now therefore*, it is agreed that in consideration of the transfer of securities of the value of fifty thousand dollars ($50,000.00) by said Morris M. Hirsh to said" (naming the child with whom such agreement was made), "the amount of which save such amount as is a reasonable and proper consideration for the payment of the annuity hereafter mentioned is hereby paid over and transferred as a gift."

The child named respectively in each of said four agreements then thereby agreed "to pay to said Amalie Hirsh, on the first day of May and on the first day of November of each year hereafter, only, however, that said Amalie Hirsh is then living, the sum of one thousand dollars ($1,000.00); and should Morris M. Hirsh survive said Amalie Hirsh then in such case said" (naming the child

with whom the agreement was made) "agrees to pay after the death of said Amalie Hirsh to said Morris M. Hirsh on the first day of May, and on the first day of November of each year thereafter, only, however, that said Morris M. Hirsh is then living, the sum of one thousand dollars ($1,000.00)."

These four agreements were all signed by Morris M. Hirsh and one by each of the children with whom each agreement was separately made, respectively. Pursuant to these agreements securities of the value of $50,000.00 were transferred to each of decedent's four children—an aggregate of $200,000.00. The value of the securities transferred to the children as aforesaid was at the time of said transfer and of the decedent's death $200,000.00, and the rate of interest in the securities so transferred was 6 per cent per annum.

At the time the said contracts of November 1, 1919, were made each of the said four children was financially able, in his or her own right, to pay the agreed annuity, regardless of said securities.

When plaintiffs made return for the estate tax they did not include in the value of the gross estate the value of any of the four transfers, or any part of them, and upon audit of the return the Commissioner of Internal Revenue held that the transfer of the securities in the sum of $50,000 to each of the children was in part a transfer intended to take effect in possession or enjoyment at or after the death of Morris M. Hirsh, within the meaning of section 402 (c) of the revenue act of 1918, 40 Stat. 1057, 1097.

The commissioner determined this value to be two-thirds of the amount of $200,000, or $133,333.33, as being the sum which invested at 6% would produce an annuity of $8,000 per annum (each child stipulating to pay $2,000 as stated). The sum of $133,333.33 was accordingly included in the value of the gross estate. The additional estate tax caused by such inclusion is the basis of the present suit.

The commissioner determined that decedent did not make any of the transfers here involved in contemplation of death and based his action on section 402 of the revenue act of 1918, 40 Stat. 1097, which provides, in part, as follows:

Opinion of the Court

"That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real and personal, tangible or intangible, wherever situated—

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, * * * intended to take effect in possession or enjoyment at or after his death * * * except in a case of a bona fide sale for a fair consideration in money or money's worth."

In order that the issue which arises in this case may be clearly understood, it should be stated that while the findings show that there was also a transfer made by the decedent to his wife of securities of the value of $200,000, as a gift, the commissioner held that the transfer made by decedent to his wife was not made in contemplation of death and formed no part of his taxable estate. The findings show in detail the proceedings with reference to the collection of the estate tax involved in the case, including the filing of a plea in abatement and also a claim for refund, but it is only necessary to state here that all questions relating to this transfer to decedent's wife have been eliminated from the case. The controversy herein relates entirely to the transfers made to the children of decedent, as above set forth; and, as before stated, it is conceded that these transfers were not made in contemplation of death. The sole question remaining in the case is whether after this transfer to his children the decedent retained any interest in the securities so transferred, or control over them, or created a trust "intended to take effect in possession or enjoyment at or after his death," so as to bring the securities within the purview of subdivision (c) of section 402.

Upon no logical theory can it be claimed that the transfer of the securities was not intended to take effect in possession or enjoyment until at or after decedent's death. The transfer was complete upon the execution of the contract and was absolute and without reservation. The transferees entered at once into the possession and enjoyment of the securities. There was no restriction placed upon their sale or disposal. The transfer was absolute, and decedent completely and irrevocably divested himself of all title, right, or

interest in the securities conveyed. It is clear also that the securities were not chargeable with the annuity. Each of the four children was personally obligated to pay a specified annuity regardless of whether any return was received from the securities and each child was financially able to pay the annuity. The decedent had no control whatever over the property conveyed after the transfer nor did he have any power to change the terms or provisions of the annuity which had been contracted for in the case of each child.

There seems to us to have been a misunderstanding on the part of the commissioner as to the effect of the contract. No trust was created thereby. The agreement in each case provided for two things—first for a gift of a certain amount in the form of securities; second, for the purchase of an annuity, the purchase price not being computed but specified as "such amount as is a reasonable and proper consideration for the payment of the annuity hereafter mentioned." It is true that this is indefinite, but being something that could be made certain, its indefiniteness did not invalidate the agreement, and in fact no claim of that kind is made on behalf of defendant. It is, we think, obvious that if the decedent had purchased separately the annuities, either of some insurance company or of some of his children, and then given the remainder of the property covered by the agreement to his children, no claim could reasonably be made that any of the property so used was subject to the estate tax on the death of decedent. The annuities in this case terminated upon the death of the decedent, as annuities usually do, although the termination thereof, of course, depends on the contract. The fact that the decedent chose to unite the gift with the purchase of the annuities in one transaction, and that the parties to the agreement did not compute and specify, in dollars and cents, the amount paid for the annuities does not, in our opinion, alter the nature of the transaction.

The defendant relies upon the case of *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339. In that case the property held to be taxable as part of the estate of the decedent had been conveyed by him in his lifetime in trust, reserving the income therefrom for the period of his lifetime and also the

right to revoke the trust. It will be readily seen that the decedent in that case did not part with his interest in the property completely, but on the contrary still retained control of it. The case is therefore not an authority for holding that the property involved in the case at bar is subject to the estate tax.

Counsel for defendant lay much stress upon the language of the decision in the *Northern Trust Co. case*, *supra*, wherein, with reference to certain other trusts also involved, the Supreme Court said:

" * * * the trust, for all practical purposes, had passed as completely from any control by decedent which might inure to his own benefit as if the gift had been absolute."

But this language should not be construed as a holding by the Supreme Court that, whenever a decedent in his lifetime has made a contract which will or may in the future inure to his own benefit, property conveyed as a consideration for such contract is subject to the estate tax. The emphasis should be not upon the words "might inure to his own benefit," as contended on behalf of defendant, but upon the words "had passed as completely from any control by decedent * * * as if the gift had been absolute." The important feature is that the property had passed entirely out of the control of the decedent, as it had in the case at bar, where he had no control over either the property which was conveyed or the terms and conditions of the annuity after the agreement had been made." It should be noted also that the decision in the *Northern Trust Co. case* was made upon an altogether different state of facts.

It is said in the argument for defendant that the control considered in the *Northern Trust Co. case* and held to authorize an excise tax was an unexercised right to shift the economic benefits of the property. Conceding for the sake of the argument that this is a correct statement, we find that the decedent, after the execution of the agreement, had no unexercised right in the property conveyed. Nothing that he could thereafter do would change the contract for his benefit or advantage in any kind of a way. As before stated,

the case presented is simply one where a gift and purchase of an annuity were combined.

It follows that plaintiff is entitled to recovery as prayed in the petition and judgment will accordingly be so rendered.

WILLIAMS, *Judge*, and LITTLETON, *Judge*, did not hear and took no part in the decision of this case.

GRAHAM, *Judge*, and BOOTH, *Chief Justice*, concur.

THREE-IN-ONE OIL CO. v. THE UNITED STATES

[No. F-217. Decided December 2, 1929]

On the Proofs

Income and profits taxes; invested capital; trade-mark and good will; increase by advertising.—Where it is not proved how much the value either of a trade-mark or of good will was increased by advertising, or how much of the expense of advertising was attributable to increase in such values, a corporation is not entitled to a refund of its income and profits taxes based on an increase of invested capital by the amount of expenditures for advertising.

The Reporter's statement of the case:

Mr. Edward F. Clark for the plaintiff. *Mr. Roger Hinds* was on the brief.

Mr. Ralph C. Williamson, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff is a corporation incorporated in 1899 under the name of G. W. Cole Company, which corporate name was changed December 6, 1907, to Three-In-One Oil Company. Its business is that of bottling, advertising, and selling under the trade-mark "Three-In-One Oil," an oil used for various purposes. The trade-mark was bought prior to the year 1901. The plaintiff, at all times, carried on its books as an asset the amount which it had fixed as the value of this trade-mark.

Reporter's Statement of the Case

II. Plaintiff's books of account showed by years the amount of plaintiff's expenditures for advertising in connection with its business as follows:

1901		$8,825.54
1902		16,555.66
1903		8,712.36
1904		35,030.71
1905		22,905.49
1906		26,635.01
1907		38,500.09
1908		74,980.09
		232,144.95
Credits to the account were as follows:		
Cash rebate on advertising	$3,070.00	
Less direct charge	145.63	
	2,924.37	2,924.37
		229,220.58

During certain periods certain of the amounts so expended for advertising were charged, in the first instance, to expense on its books, but were finally charged to an account denominated "Good will, Trade-mark, and Advertising." The company's books also contained balance sheets and profit and loss statements wherein the advertising and expenses in question are excluded as assets from surplus.

Up to and including 1908, the plaintiff expended the sum of $10,029.74 for an item denominated "Law Suit" on the books, and which was eventually carried into the same account, but there is no evidence as to the nature of the suit or the issues involved therein.

III. Advertising expenditures were for free samples of the oil, which were mailed or otherwise distributed for advertising purposes, also for advertising in periodicals, on billboards, in street cars, and through circulars, signs, etc. The advertisements in the forms above stated, set forth the qualities and usefulness claimed for Three-In-One oil, and in some instances the price. Some advertisements also stated in substance that it had been extensively advertised and used all over North America, England, Australia, etc.

IV. During the years in which such expenditures were made, the sale of Three-in-One oil rapidly increased, but there is nothing in the evidence to show how much of this increase was due to said advertising or how much the advertising increased the value and amount of the good will of the business.

V. Plaintiff, on and prior to May 16, 1918, paid corporation income and profits taxes for the year 1917 in the sum of $29,451.82, its invested capital being fixed by the commissioner in the sum of $315,468.73. Also, on and prior to December 12, 1919, plaintiff paid corporation income and profits taxes for the year 1918 in the sum of $45,229.09, its invested capital being fixed by the commissioner in the sum of $369,791.48. Also, on and prior to December 12, 1920, plaintiff paid corporation income and profits taxes for the year 1919 in the sum of $38,719.80, its invested capital being fixed by the commissioner in the sum of $420,705.70. In each case, the advertising expenses hereinabove set forth were excluded in the computations of the tax from capitalized expenditure and not included in the amount of invested capital.

VI. A waiver in writing of the time prescribed by law for making any assessment of the amount of income and excess-profits taxes to any return made on behalf of the taxpayer for the years 1917, 1918, and 1919, to remain in effect until December 31, 1926, was signed by the plaintiff and by the commissioner March 29, 1926. Prior to the time of the execution of the waiver the plaintiff had filed claims for refund of taxes as follows:

On taxes of 1917	$12,000.00
On taxes of 1918	12,000.00
On taxes of 1919	11,422.86

All of these claims for refund were based upon the exclusion from invested capital in the amounts hereinabove shown to have been expended in advertising. The claims for refund above specified were rejected by the commissioner.

In its petition the plaintiff prayed judgment for a refund of $12,345.41 on the taxes of 1917, $6,169.25 on the taxes of 1918, and $11,965.65 on the taxes of 1919.

VII. On the 4th day of November, 1925, the Commissioner of Internal Revenue mailed a letter to plaintiff alleging a deficiency in the tax for the year 1919. Prior to the last-named date and when plaintiff filed its claim for refund of the taxes alleged to have been overpaid for the year 1919, plaintiff had paid all of the taxes for the year 1919 which had theretofore been assessed against it. The amount of this deficiency for the year 1919 was stated by the commissioner to be $1,465.56, and plaintiff took an appeal from this decision of the commissioner to the United States Board of Tax Appeals. The evidence does not show that this appeal has been finally determined, and it was still pending at the time this action was commenced. The additional taxes specified in the commissioner's deficiency letter have not been paid.

The court decided that plaintiff was not entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

This suit is begun to recover taxes alleged to have been wrongfully collected by reason of the failure of the commissioner to include in invested capital advertising expenses incurred in the years 1901 to 1908, inclusive.

Plaintiff is a corporation engaged in the business of bottling, advertising, and selling an oil, sold under the trade-mark of "Three-In-One oil." It acquired this trade-mark prior to 1901 from another corporation and has carried the cost thereof ever since on its books as an asset. In the years above mentioned, it spent large sums for advertising, beginning with $8,825.54 in 1901 and ending with $74,980.09 in 1908. In all, the total, less certain credits, is $229,220.58.

It is claimed by plaintiff in argument that by and through these expenditures for advertising the plaintiff's trade-mark and good will were developed to the extent of the amounts so spent and thereby that these advertising expenses should have been added to the amount of invested capital before assessing the tax for the years in controversy. The commissioner took the opposite view and refused to include the advertising expenses in invested capital, and by reason there-

of plaintiff's taxes were largely increased. The question to be determined is whether this action of the commissioner was in accordance with law.

Just what is meant by the word "developed," as used in this connection, is not clear. Counsel for plaintiff also speak of the good will being "built up," but this expression is not explained. Apparently the contention is that by reason of the advertising the value of the plaintiff's trade-mark and good will increased to the extent of the amount paid therefor, or at least that the purpose of the advertising was to increase the value of the trade-mark and good will and therefore the expenses for such purpose should be capitalized.

It is well settled that payments made for the purchase of a trade-mark and good will may constitute part of invested capital in cases of the nature under consideration, but the amount so paid must be shown. In the instant case, the evidence shows, as before stated, the payments of large sums for advertising, but it also shows that this advertising was of the same kind and nature that would have been used if the sole purpose was to increase sales. Free samples were distributed, and advertisements published in periodicals, on billboards, in street cars, and through circulars, signs, etc. These advertisements set forth the qualities and usefulness claimed for Three-In-One oil, and in some instances the price. During the period in which these expenses were made for advertising, the sales increased rapidly from year to year. Part of this increase was probably due to other efforts besides that of advertising, but there is no way of determining the portion or part due to other action taken by the plaintiff. So also, while it is probable that the advertising increased the value of the trade-mark and the good will of the company, there is no way of determining to what extent this took place. It seems to be contended that good will is created or increased solely through advertising, and that advertising is solely for that purpose, yet it is a matter of common knowledge that there are concerns doing an enormous business which do little and in many cases no advertising but these institutions must possess a certain amount of good will. We think it may also be said to be a matter of common knowledge that advertising is principally used

for the purpose of promoting sales. Regardless of these matters, it is clear that the evidence affords no means of determining how much the value either of the trade-mark or of the good will was increased by the advertising, and how much of such advertising expense was attributable to such increase in value, if there was any. An examination of the findings shows there is absolutely no evidence on this subject. In fact, that such evidence as was presented tends to show that the greater part of the increase in sales was attributable to the advertising. Such being the condition of the record, there is no way in which the court can separate the amount of these expenses, if any, which should be capitalized, from those that are merely a current expense and should be charged as such.

It is urged on behalf of the plaintiff that its books show that these advertising expenses were capitalized by being carried to a capital account. The evidence is that at first the advertising expenses were charged to expense, but later were carried to a capital account and carried as an asset. The manner in which the account was kept indicates that plaintiff's officers had some doubt as to how the account should be carried on its books, but while the manner in which the account is carried upon the books might be taken into consideration with other evidence, if there was other evidence, to show that these advertising expenditures were properly capitalized, it is not sufficient by itself and alone to prove that fact. If such were the rule, the taxpayer could simply by bookkeeping entries determine such questions as are herein involved against the Government, making himself the sole judge of how the tax should be applied. This can not be the rule.

In the case of *Richmond Hosiery Mills* v. *Commissioner of Internal Revenue*, 29 Fed. (2d) 262, which was quite similar to the one at bar, the court, approving *Richmond Hosiery Mills* v. *Commissioner*, 6 B. T. A. 1247, 1254, held that the burden was on the "petitioner to show with reasonable certainty the amount properly attributable to the increased value of the trade-mark, and this burden is not sustained by opinion evidence as to its present value."

In the case at bar there is not even opinion evidence as to the present value either of the trade-mark or the good will of the company. See also as to the burden of proof *Northwestern Yeast Company*, 5 B. T. A. 232, 238.

It is also urged on behalf of plaintiff that its volume of sales in the years 1901 to 1908 were large in comparison to the amount of its tangible assets, and that this implies the existence of good will. The plaintiff, not being a manufacturing corporation but merely engaged primarily in sales, naturally did not require a large amount in the way of tangible assets. While this fact may show the existence of good will, it is no evidence of the amount at which it should be valued. Taking the evidence as a whole, we find nothing that enables us to say how much of the advertising expenditures should be capitalized and how much should be charged to expense.

The determination that plaintiff is not entitled to have its advertising expenses included in its invested capital for the years involved makes it unnecessary to pass on other questions raised in the case. It follows that plaintiff's petition must be dismissed, and it is so ordered.

Williams, *Judge;* Littleton, *Judge;* Graham, *Judge;* and Booth, *Chief Justice*, concur.

CHICAGO & NORTH WESTERN RAILWAY CO. v. THE UNITED STATES

[No. D-411. Decided December 2, 1929]

On the Proofs

Statute of limitations; freight service.—See *Southern Pacific Co. v. United States*, 67 C. Cls. 414.

Reformation of contract; negotiating officers in charge of work; payments thereunder.—Where the issue in a case is the reformation of a written contract, the essential fact to be ascertained is the real agreement between the parties. Evidence thereof is the conduct of responsible negotiating officers who are also charged with the subsequent performance of the

contract, and the payments thereunder made by the officer charged with knowledge of the contract and having authority to approve or disapprove payments.

The Reporter's statement of the case:

Mr. Nye F. Morehouse for the plaintiff.

Mr. Heber H. Rice, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff, Chicago & North Western Railway Co., is a railroad corporation organized and existing under the laws of Illinois, Wisconsin, and Michigan, and operating a system of railways in said States and certain other States as a common carrier of passengers and freight for hire.

II. Said plaintiff was thus engaged in the railroad business for many years prior to January 1, 1918, and has been likewise engaged since the end of Government control of railroads on March 1, 1920. On March 12, 1917, plaintiff in conjunction with other connecting lines of railroad transported a shipment of property at the request of and for the Government, from Fort Bliss, Texas, to Fort Sheridan, Illinois. This property consisted of 5 carloads of miscellaneous troop property, 7 carloads of escort wagons, and 5 carloads of horses, all belonging to Companies A and C, Ohio Engineers, and moving in connection with the movement of those organizations from Fort Bliss to Fort Sheridan. The shipment did not originate on plaintiff's line, but plaintiff was the delivering carrier at destination, and said property was delivered by it to proper officers of the United States Army at Fort Sheridan on March 15, 1917.

III. Thereafter, as the delivering carrier, plaintiff caused a statement of the account against the Government for the transportation charges accruing on account of the transporation aforesaid to be made out and same was forwarded to the depot quartermaster, Washington, D. C., on December 10, 1917. The amount stated was $3,432.09, which plaintiff figured to be the correct amount due under the applicable rates found in the tariffs existing at the time the shipment moved. On February 15, 1918, the depot quartermaster passed the

statement on to the Auditor for the War Department, who later, on July 3, 1918, allowed $354.75, disallowing the balance of the claim as originally submitted, amounting to $3,077.34. The reason given by the auditor for this disallowance was that certain existing tariffs provided for the furnishing of a baggage car free with each 25 tickets, and since 410 men moved in connection with this property the auditor contended that the tariffs required the railroads to furnish 16 baggage cars free for the use of moving said property accompanying the movement of the troops.

IV. Plaintiff protested the disallowance aforesaid, and thereafter the matter was brought before the Assistant Comptroller of the Treasury, who on February 6, 1919, affirmed the ruling and disallowance made by the Auditor for the War Department.

Thereafter, on September 28, 1921, after the decision in *Missouri Pacific case* (56 C. Cls. 341), plaintiff submitted to the Comptroller General, General Accounting Office, War Department Division, Washington, D. C., a substitute account against the United States covering the above movement of property, said substitute account being in the amount of $3,498.09, which included the same figures as originally stated, together with an additional item of $66 covering the transportation charge for five carloads of horses included in the above property, covering their movement from Chicago, Ill., to Fort Sheridan, that item of the charge having been overlooked in the original statement of the account. Plaintiff, in presenting said substitute account, referred to and protested against the previous disallowance, returned the warrant for $354.75, and stated that the settlement had not been accepted.

This amount was subsequently paid to the plaintiff by the Government.

V. On October 24, 1921, and again on February 27, 1922, the Comptroller General wrote letters to the plaintiff in which he referred to the previous decision of the Auditor for the War Department, and affirmance thereof by the Assistant Comptroller of the Treasury, and refused to go behind those rulings, or to reconsider, or to reopen the case, or make any further allowance therein.

VI. In July, 1917, R. H. Aishton was president of the Chicago & North Western Railway Company. Admiral W. A. Moffett, then a captain in the United States Navy, was in charge as commandant at the United States naval station, Great Lakes, Illinois. There was at that time great building activity at said station, made necessary by the war emergency, and large numbers of laborers were employed thereon under various contractors. In the course of building, due to the emergency, it became necessary to build quickly certain trackage and a viaduct to enter said station. In the early part of July, 1917, said Moffett appealed to said Aishton to do the work and insisted on its being done as soon as possible. Aishton verbally agreed with said Moffett to do this work on a cost plus ten per cent (10%) basis. It was not possible to secure at Great Lakes the necessary labor with which to do this work. There were no facilities for housing the laborers there, so labor had to be transported to and from Chicago and environs. This fact was well known to the officers of defendant.

VII. Pursuant to the verbal agreement, plaintiff proceeded on July 9, 1917, with the work of laying trackage and building the viaduct. Several weeks thereafter a written contract covering the work was presented to plaintiff by defendant, and after having been approved by plaintiff's chief engineer and general counsel was duly signed and executed by President Aishton for and on behalf of plaintiff on or about August 31, 1917, as of the date of August 1, 1917.

Said written contract contained Addendum No. 1, to the general provisions forming a part of the specifications for public works, Bureau of Yards and Docks, and provided:

"*Definition of costs of work.*—The items of cost included under the terms of 'cost of work' on which the percentages named in contract shall be applied are hereby defined as follows:

* * * * * * *

"(c) Transportation to and from the site of the necessary skilled men for the economical and efficient prosecution of the work. The necessity for such transportation shall be determined by the officer in charge; such transportation shall not involve repeated travel."

In behalf of the United States the contract was signed by F. D. Roosevelt as acting Secretary of the Navy. There

is no evidence as to his knowledge of the terms thereof or his understanding of the negotiations leading up thereto.

At the time the said Aishton affixed his signature he was not cognizant of the inclusion of any clause therein prohibiting the payment of repeated travel.

Admiral Moffett did not know that a clause prohibiting payment for the cost of repeated travel was included in the printed addendum attached to the contract. It was his understanding that the formal contract provided payment for repeated travel.

VIII. James D. Pole, a representative of plaintiff, attended a conference on July 9, 1917, in the city of Washington, between naval officers of the defendant, among whom were the Chief of the Bureau of Yards and Docks and Captain George A. McKay, who about the middle of July became the public-works officer in charge of construction at Great Lakes Station, and various contractors doing work at said naval station who were confronted with the same labor conditions which pertained to plaintiff, and at this conference the subject of "repeated travel" was discussed. The said Pole left the conference with the impression that the naval officers favored the allowance of repeated travel as part of the cost of construction at Great Lakes Station.

About July 27th the said Captain McKay, who had by that time become the public-works officer, advised the said Pole that he, McKay, was authorized to allow plaintiff the cost of repeated travel.

IX. On July 28, 1917, the public-works officer at the U. S. naval training station at Great Lakes by letter made the following recommendation to the commandant of said station, which was by the commandant on the same day approved and forwarded to the Bureau of Yards and Docks:

"9. Paragraph 3, (c), of Addendum #1, of the General Provisions, states:

"'Such transportation shall not involve repeated travel.' This paragraph will render it impossible for the public-works officer to approve bills submitted by the contractor for the transportation of these workmen, as it is impossible to prosecute this work without paying for this transportation, it will be necessary to change the contract to permit payment for same and the public-works officer recommends that all

Reporter's Statement of the Case

cost-plus-percentage contracts for this station be modified by the incorporation in same of a clause reading as follows:

"Where labor conditions are such as to require workmen to be transported daily to and from the work, the officer in charge shall investigate as to the necessity for same and as to the prevailing custom on similar work in the same locality and where such recognized and prevailing custom covers the payment by the contractor of transportation charges for workmen to and from the work, this item of expense will be approved where same is authorized and incurred. Where such transportation expense can be lessened by the rendering of special cars or trains, bills for same may be approved if affirmed proper by the officer in charge."

On August 2, 1917, the said public-works officer by written communication furnished the said commandant with information as to the specifications necessary for the contract in question with plaintiff, and suggested certain modifications and amplifications of Addendum No. 1 to the General Provisions, but made no reference to repeated travel.

On August 6, 1917, the Bureau of Yards and Docks, in response to the said letter of July 28, 1917, and a telegram from Great Lakes Station dated August 6, 1917, requesting telegraphic advice specifically whether the change recommended in the aforesaid paragraph No. 9 would be made, as it was necessary to have this information previous to certifying vouchers as correct, and for telegraphic advice as to action covering other changes, wired the naval training station at Great Lakes the telegram which is incorporated in its letter thereto of August 9, 1917, as follows:

611-1 Great Lakes

NAVY DEPARTMENT,
BUREAU OF YARDS AND DOCKS,
Washington, D. C., Aug. 9, 1917.

From: Bureau of Yards and Docks.
To: U. S. Naval Training Station, Great Lakes, Ill.
Subject: Changes to cost-plus percentage contract for camp construction.
References: (*a*) Station letter 6397 dated July 28, 1917.
(*b*) Station telegram 10506.

1. In reply to reference (*b*), the following telegram was sent:

"10506. The bureau approves all changes as recommended. Change paragraph four will be incorporated in

the contract. Second method paragraph 5 approved. Advise contracts to which they apply. 16306."

2. It is assumed by the bureau that certain changes recommended in reference (*a*) apply to certain of the contracts covering the above work, and do not apply to others. Rather than change the addendum No. 1, the bureau prefers to authorize the changes in formal change orders to the particular contracts to which each change applies.

C. D. Thurber,
By Direction of the Chief of Bureau.

On August 9, 1917, the Bureau of Yards and Docks wrote the Chief of Naval Operations as follows:

2491

Navy Department,
Bureau of Yards and Docks,
Washington, D. C., Aug. 9, 1917.

From: Bureau of Yards and Docks.
To: Chief of Naval Operations (in duplicate).
Subject: Contract No. 2491 for emergency bridges and accessories, naval training station, Great Lakes, Ill.

1. Contract for the work mentioned above has been awarded to the Chicago Northwestern Railway Co., Chicago, Ill., on the basis of cost plus ten per cent for work performed directly by the contractor and five per cent for subcontract work.

2. The estimated amount of money involved in this contract is $60,000.

C. D. Thurber,
By Direction of the Chief of Bureau.

The amount estimated as the cost of the work was furnished at the inception thereof to the then public-works officer, N. M. Smith, by plaintiff's representative, J. D. Pole, and included in the statement thereof and in the total estimate was a specific item covering repeated transportation. The said public-works officer approved the estimate as presented.

On August 20, 1917, the public-works officer made further suggestions to the commandant as to changes in the contract, but therein made no reference to repeated travel. Work on the original contract was completed by August 24, 1917, and the work covered by change A, October 4, 1917.

X. A record of the repeated travel was kept by the plaintiff and checked daily by a Navy Department representative.

The items mentioned below were all checked and approved by the public-works officer and they were paid by defendant after requiring the plaintiff to execute the formal receipt and release, a copy of which is attached to the petition herein as Exhibit C. Later these items were deducted by defendant's officers from other money due plaintiff.

The items so paid and afterwards deducted are made up as follows:

(1) Repeated travel: Transportation of workmen daily to and from work	$1,824.96
(2) Other travel: Original transportation of workmen to the work and return to their homes, including some week-end trips in accordance with labor agreements	239.47
(3) Work-train service	1,251.94
Total	3,316.37

In addition to the aforesaid sum of $1,824.96 there was claimed and paid, but not refunded to or thereafter deducted by the Government, the sum of $789.91 for repeated travel.

XI. The amounts charged by plaintiff for repeated travel were reasonable.

XII. Prior to execution of the formal contract, after receiving verification from Captain McKay of the understanding that repeated travel was to be paid for, the aforesaid James D. Pole submitted to the public-works officer at said station an estimate of the cost of additional work (later covered by Change A, dated September 21, 1917) including therein an estimated amount covering transportation of men sufficient to cover repeated travel, and the public-works officer wrote a letter directing him to proceed in accordance with such estimate, knowing repeated travel was included therein. Said Pole caused the bills to be prepared including therein the cost of repeated travel in accordance with his understanding. These bills, including the items involved in this suit, were approved by U. S. Navy Public Works Officer Walter H. Allen, and were submitted to the Bureau of Yards and Docks. The items were thereafter allowed and paid.

When the formal contract prepared in the Bureau of Yards and Docks was received by the plaintiff the work originally undertaken had already been completed. Before it was sent

to Aishton for execution Pole checked the engineering features of the contract and approved them. He did not note the last sentence of paragraph 3 (c) of the printed Addendum No. 1, prohibiting payment for repeated travel and he had at the time of execution of the contract the same understanding as at the time the work was undertaken, namely, that repeated travel would be paid for as a part of the cost of the work. He was never informed to the contrary by any representative of the defendant and first became aware of the existence of said paragraph 3 (c) when the defendant later deducted the items herein in controversy from other money due plaintiff.

All other contractors at Great Lakes station were paid, as part of the cost of their work, the cost of repeated travel.

XIII. During the period involved herein plaintiff paid labor considerably less than a number of other contractors who were then engaged in construction work at said station, and to whom defendant allowed payments for repeated travel for their labor.

XIV. Admiral Moffett was not authorized to contract for the United States, his duty in connection with contracts being limited to making recommendations to the Navy Department, to see that the work was well performed, that the inspection was carried out carefully and faithfully, that the terms of the contracts were observed, and to keep account of the costs.

James D. Pole, hereinabove referred to, was plaintiff's representative in active charge of its work at Great Lakes station. He acted under the plaintiff's chief engineer, who in turn was directed by the company's president. President Aishton was the only representative of plaintiff who had contractual authority.

Captain George A. McKay was a civil engineer, U. S. Navy, was public-works officer in charge of construction at Great Lakes after July 18, 1917, under the commandant, and had nothing to do with letting of the contract to plaintiff. He was not a contracting officer. He was detached January 26, 1918, and succeeded by Commander Walter H. Allen.

Preceding in office as public-works officer was N. M. Smith. The said Smith's authority does not appear.

XV. It was the understanding and intention of Mr. Aishton and Admiral Moffett that repeated travel was to be allowed to plaintiff as part of the costs of this project and was understood to be so by the plaintiff at the time of the commencement of the work.

The court decided that plaintiff was entitled to recover, in part.

Booth, *Chief Justice*, delivered the opinion of the court:

The plaintiff, Chicago & North Western Railway Company, alleges two causes of action in its petition. The first is for the recovery of freight charges, said to be due under the decision of this court in the case of *Missouri Pacific Railroad Co.* v. *United States*, 56 C. Cls. 341. The facts bring the contention within the *Missouri Pacific case* in so far as the service rendered is characterized therein, but the date of rendition of the service precludes a recovery because of the statute of limitations.

On March 12, 1917, the plaintiff, together with connecting lines, transported a shipment of Government property from Fort Bliss, Texas, to Fort Sheridan, Illinois. The shipment was made up of 5 carloads of miscellaneous property, 7 carloads of escort wagons, and 5 carloads of horses. It was accomplished and the property delivered to the defendant on March 15, 1917. The Auditor for the War Department made certain deductions from the bill rendered, the matter finally reaching the Comptroller General, who refused to sustain the plaintiff's contention. Following the decision of this court in the *Missouri Pacific case* (*supra*), the plaintiff renewed its effort to have the claim allowed in accord with this decision, and was again unsuccessful. The petition herein was not filed until June 30, 1924, more than six years after the claim accrued, and, as held in the case of the *Southern Pacific Company* v. *United States*, 67 C. Cls. 414, is clearly barred by limitation.

The second cause of action is more involved. The single issue, conceded by the parties, is the reformation of an ex-

press contract. The jurisdiction of the court is not questioned. *Cramp case*, 239 U. S. 221, 231; *Milliken Imprinting Co. case*, 202 U. S. 168; *South Boston Iron Works case*, 34 C. Cls. 174; *Western Cartridge Co. case*, 61 C. Cls. 482. Two substantial and familiar rules of law prevail. The mistake, to warrant reformation, must be a mutual one, and the evidence must be clear and convincing that both parties did not intend what the contract expresses. *Maxwell Land-Grant case*, 121 U. S. 325, 381.

Admiral W. A. Moffett, then a captain in the United States Navy, was in July, 1917, commandant at the United States Naval Station, Great Lakes, Illinois. At this particular time war activities at the station were extremely extensive and acute. The construction of buildings was pressing and important. Large numbers of workmen were employed thereon under various contractors. In the course of the adopted programme it became imperative to *at once* lay certain trackage and construct a viaduct in connection therewith to enter the station. Captain Moffett procured from R. H. Aishton, the president of the plaintiff company, an oral agreement to at once perform this service upon a cost-plus-ten-per-cent basis, it being fully understood that the agreement would be later reduced to writing. The Great Lakes Station afforded no facilities for housing laborers and no source of supply. Labor had to be imported from Chicago and environs, and obviously had to be transported to and from the station. The plaintiff proceeded at once without the slightest delay to do what it promised to do and completed the work expeditiously and to the entire satisfaction of all parties involved. The written contract signed by the president of the plaintiff company on August 31, 1917, was by its terms to be effective as and of the date August 1, 1917, and embodied the oral understanding previously existing between the parties, except as to the clause in controversy here. This clause reads as follows:

"(c) Transportation to and from the site of the necessary skilled men for the economical and efficient prosecution of the work. The necessity for such transportation shall be determined by the officer in charge; such transportation shall not involve repeated travel."

Opinion of the Court

This clause appears in an addendum, identified as #1, to the general provisions of the contract, forming a part of the specifications for public works. The addendum on its face indicates its preparation to cover generally cost-plus contracts, irrespective of the particular work in hand, and prepared as a general provision long in advance of the contract to be subsequently made. The contract was formally signed by the Acting Secretary of the Navy and upon the part of the plaintiff by the president of the railway company. It nowhere appears that the Assistant Secretary of the Navy knew or did not know what the contract contained, and the plaintiff's president executed it as an office routine, after it had been presented to him by others to sign. It is important, however, to take into consideration the events which antedated the execution of the contract, and arrive at what was the mutual understanding and intended agreement as to this stipulation. The contract was not signed until *after* the original work was completed. Therefore, it is vital to ascertain what was agreed upon and understood by the parties to be later reduced to writing. On July 9, 1918, a representative of the plaintiff attended a conference in Washington made up of naval officers, among whom was the Chief of the Bureau of Yards and Docks, and Captain George A. McKay, the latter becoming in a few days the public-works officer at the Great Lakes Station. The subject-matter of the conference was construction work at the Great Lakes Station and representatives of other contractors besides the plaintiff were present. The question of an allowance as a cost item, of the transportation of labor to and from the station daily was discussed, and the plaintiff's representative was under the impression that it had been agreed upon, and the item was to be allowed as cost of work. That his impression was well founded and correct is corroborated by the allowance to other contractors of the item as cost of work, and by the advice of Captain McKay, then public-works officer, that he was duly authorized to allow the item. Again, on July 28, 1917, while this plaintiff and other contractors were performing their contracts, the public-works officer at the station forwarded an express recommendation to the commandant

(Finding IX), specifically pointing out and directing attention to the provisions of the contract to be signed, wherein under paragraph 3 (c) repeated travel as a cost item would not be allowed. This letter we set out in Finding IX. It unmistakably discloses the labor situation at the Great Lakes Station, and brings to the attention of the officials concerned in expediting the work the impossibility of accomplishing what has to be done in other manner than treating as a cost item the *daily* transportation of labor to and from the station. Changes were made in the contract upon the recommendation of the public-works officer that affected stipulations in addendum #1, but paragraph 3 (c), the one here involved, was not changed. Nevertheless, the formal award of the contract to the plaintiff, made on August 9, 1917, was expressly stated as made upon the basis of plaintiff's estimated cost of the work, which estimate included as a part of the cost the stated expense of repeated transportation of labor to and from the station daily. During the progress of the work the plaintiff kept a complete record of repeated travel; this record was carefully checked by the public-works officer, approved and without questioning paid by the defendant upon the execution of receipts by the plaintiff. No charge is made that any single item of the claim is excessive or unreasonable, that the service was not furnished or in any respects unnecessary. It is likewise conceded that other contractors were allowed and paid repeated travel costs as part of the cost of doing the work. No prohibitive stipulation was inserted in their contracts, or invoked against them.

Without going further into detail it is sufficient to observe that both in the field and in Washington the subordinate and contracting officials intended to agree that repeated travel should be allowed as an item of cost of performing the work. The findings, carefully deduced from the record, unfold a situation that not only discloses the equity of such an agreement, but positively point out that contracts to perform the required work could not have been obtained under any other conditions. There was no other alternative, for labor was not available at the station, and no quarters existed to house or feed men at the station. No doubt exists that

every official of the plaintiff having to do with the contract honestly believed a provision in the contract provided for this situation, and beyond disputation the officers of the defendant entertained a like opinion. That such was the real agreement seems to us to be established.

The defendant, combating a conclusion such as we have reached urges the fact that the plaintiff, a railway company, was possessed of the means of transportation and therefore was to be discriminated against in this respect. The apparent weakness of the contention is the proven fact that the plaintiff did not maintain a service on its line for this purpose, and in order to meet the emergency existing provided a *special* service for the transportation of its own and other contractors' labor, a service which involved additional expense and the employment of special equipment. If the case is to be determined by actual knowledge of the agreement upon the part of the Assistant Secretary of the Navy and his individual assent being given to the contract upon the single condition that repeated travel of laborers was not to be considered a part of the cost of performance, then manifestly the plaintiff must fail, for the record is silent in this respect. The course of procedure leading up to the execution of the written contract, an instrument following the completion of all the original undertaking of the parties, is convincing evidence that what the Assistant Secretary intended to do was to carry into legal form what the subordinates in the department had agreed upon. The Bureau of Yards and Docks was the authoritative bureau of the department in immediate charge of the work and the negotiations and letting of contracts. This bureau and its officials were in contact with the situation and the details of the same were repeatedly referred to the bureau by the officials in the field and on the premises. This was the adopted and pursued course of procedure, and there is nothing in the record that indicates in any way that the Assistant Secretary was doing anything more than approving in a formal way precisely what had been previously agreed to and it is in the Bureau of Yards and Docks that the terms of contracts like the one involved herein are settled. As said in the case of *Ackerlind* v. *United States*, 240 U. S. 531, 534, "The

contract is made with the principal and the several steps are to be regarded as if they all had been taken by him. Here the United States made the contract by the Bureau of Equipment and by its mouth requested the Bureau of Supplies and Accounts to put it on paper and sign it. What the Bureau of Supplies and Accounts understood is immaterial, it simply followed the requisition of the Bureau of Equipment. There was a mistake made by a clerk in not striking out a printed clause from that requisition. It is as if a principal after making the agreement had taken a printed form and forgotten to draw his pen through the words. The failure of the contractor to read before signing an instrument the terms of which he had seen in print is not enough to debar him from seeking relief. *Equitable Safety Ins. Co.* v. *Hearne*, 20 Wall. 494." In the case of *United States Cartridge Co.* v. *United States*, 62 C. Cls. 214, 230, the court said:

"It was primarily not its fault that the clause was not in the contract as submitted to it for execution and if such a rule were to be invoked in all cases so that relief was to be denied on the ground that failure to discover an error constituted such negligence as precluded relief, it is difficult to see how there could ever be a case in which such relief might be granted, for if errors were always to be discovered before the execution of contracts it would seem that there could be no errors for correction."

The authorities, too many to cite, uniformly sustain the principle that the gravamen of the investigation is the ascertainment of the real agreement, the terms and conditions mutually assented to, and when so ascertained give effect thereto in cases where the failure to express them in the written contract is convincingly established. The proof herein we think meets the requirements of the rule. When the parties charged with the responsibility of negotiating contracts, in fact complete one, and are thereafter responsible for its performance, treat a particular service performed as one to be paid for it is one element of proof, most convincing. If, following the above proceeding, estimates of the cost of the service are made and certified to the bureau charged with knowledge of the contract and clothed with authority to approve or disapprove payments, and approved and paid

without protest for the service now in dispute, such conduct, treatment, and construction of the contract fortifies the belief that the parties agreed and intended to pay for the service from the beginning. In this case there is no positive evidence on the part of the defendant that the written contract expressed the agreement of the parties; as a matter of fact, the defendant's officers thought payment for the service was included in the contract, and acted in accord with the same.

We think the contract should be reformed, and the plaintiff awarded a judgment for $3,316.37. It is so ordered.

WILLIAMS, *Judge*, and LITTLETON, *Judge*, did not hear and took no part in the decision of this case.

GREEN, *Judge*, and GRAHAM, *Judge*, concur.

OAK WORSTED MILLS v. THE UNITED STATES[1]

[No. J–180. Decided December 2, 1929]

On the Proofs

Income and profits taxes; tentative return for 1918; commencement of statutory period of limitation.—Tentative income and profits tax return for the calendar year 1918, permitted by the Commissioner of Internal Revenue in his general circular of February 27, 1919, was not the return required by statute and did not start the running of the statute of limitations in respect to assessments within five years "after the return was due or was made."

Same; finality of special assessment; right to make new assessment; sec. 1312, revenue act of 1921.—It is a rule of long standing that an assessment by the Commissioner of Internal Revenue is not of itself final, and he may change the same within the statutory period of limitations, and the authority to do so embraces determinations under the relief provisions of sections 327 and 328 of the revenue act of 1918. Where the special assessment complained of was not made until 1922 but within the statutory period, the taxpayer can only establish its finality by bringing it within the conditions of section 1312 of the revenue act of 1921.

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[1] Certiorari granted.

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Same; assessment within statutory period; collection thereafter.—Sections 607 and 611 of the revenue act of 1928 construed, and *held* not to entitle a taxpayer to refund of a valid tax paid after the running of the statute of limitations where because of the filing of a claim in abatement collection was stayed by the collector or Commissioner of Internal Revenue of an appropriate assessment made prior to June 2, 1924, and within the statutory period, notwithstanding such claim in abatement did not under law operate to stay the collection.

Same; vested right to refund.—No vested right accrues to a taxpayer out of the running of the period of limitation for the collection of a valid tax.

Same; restrictions upon suits against the United States.—The right of a taxpayer to refund of taxes permitted by sections 607 and 611 of the revenue act of 1928 is limited to the conditions specified in the said sections, which are limitations that Congress may place upon suits against the United States.

Statutory construction; giving effect to statute.—It is the duty of the court so to construe a statute as to give it force and effect, when this can be done consistently with its language.

The Reporter's statement of the case:

Mr. William Meyerhoff for the plaintiff. *Mr. Guil Barber* was on the briefs.

Mr. George H. Foster, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

On February 17, 1930, the court overruled a motion for new trial, and with the order filed a supplemental opinion which is reported below. The court made special findings of fact, as follows:

I. On or about March 12, 1919, the plaintiff, a corporation, filed with the collector of internal revenue at Philadelphia, Pennsylvania, for the calendar year 1918, a paper (Form 1031 T) headed "Tentative Return and Estimate of Corporation Income and Profits Taxes and Request for Extension of Time for Filing Return," and on March 20, 1919, paid the sum of $20,000.00 as one-fourth of the estimated tax of $80,000.00 shown on said tentative return.

II. On June 16, 1919, the plaintiff filed a detailed corporation income and profits tax return for the calendar year 1918 on Form 1120, provided by the Bureau of Internal

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Revenue, setting forth in the various schedules therein the detailed information provided for in said form, showing a total net income of $124,488.61, with a normal tax due of $4,158.30 and an excess-profits tax of $87,836.07, making a total tax for said year of $91,994.37, and paid the balance of $71,994.37, due on said taxes in three installments during the year 1919, as follows:

June 16, 1919	$25, 997. 19
September 15, 1919	22, 998. 59
December 15, 1919	22, 998. 59

III. On or about June 27, 1921, plaintiff duly filed a formal application for assessment of its profits tax under the provisions of sections 327 and 328 of the revenue act of 1918. Said application was attached to a formal claim for refund of taxes alleged to have been illegally collected for the year 1918 in the sum of $33,425.75 and was based on said application for special assessment.

IV. In the month of April, 1922, the Commissioner of Internal Revenue, in consequence of said application and claim, caused plaintiff's tax liability to be computed under the relief provisions of said act and found, as a result thereof, that plaintiff had been overassessed the sum of $26,487.97. Said overassessment was made the subject of a certificate of overassessment bearing date of June 21, 1922, which was forwarded to and received by plaintiff together with a Treasury check in the sum of $26,487.97, and in due course plaintiff received the proceeds thereof.

V. On or prior to March 26, 1924, the commissioner without plaintiff's knowledge or consent made a reexamination of plaintiff's application and decided and so notified the plaintiff by letter dated that day that his previous determination in finding the total tax assessment to be $65,506.40 was erroneous, and decided that the "total tax liability" under sections 327 and 328 was $79,262.42, and that additional tax in the amount of $13,756.02 was due, and shortly thereafter made an assessment of said additional tax. This assessment of additional tax was made more than five years after the instrument referred to in Finding I was filed.

VI. On April 12, 1924, upon notice and demand for payment of said collector, plaintiff filed a claim in abatement

of the alleged additional tax of $13,756.02, on the grounds that the matter had become *res judicata* and was also barred by the statute of limitations and by the provisions of the revenue acts then in force.

VII. On or about February 11, 1925, the said commissioner made another redetermination of plaintiff's tax liability for the year 1918 and notified plaintiff by departmental letter that the comparatives used in his previous redeterminations were erroneous and that plaintiff had been overassessed $6,345.76, and that claim in abatement of $13,756.02 would be rejected for $7,410.26, and certificate of overassessment in the amount of $6,345.76 thereafter issued. On or about March 26, 1925, plaintiff filed an appeal from the alleged deficiency of $7,410.26 with the United States Board of Tax Appeals.

VIII. On June 1, 1925, said collector again demanded payment in writing, advising plaintiff that distraint warrant had been issued, and unless payment was made promptly said warrant would be placed in hands of deputy collector for personal service. On or about June 22, 1925, in the district court of the United States for the eastern district of Pennsylvania, a temporary restraining order was issued against the said collector pending disposition of a motion for a preliminary injunction, pending the aforesaid appeal to the Board of Tax Appeals, which said motion was denied on or about July 1, 1925.

IX. On August 27, 1925, said collector again demanded payment of the amount of $7,410.26, with interest in the sum of $592.82, and, under threat of seizure and sale of plaintiff's property, payment of the total sum of $8,003.08 was made to collector, under protest, on September 10, 1925.

X. On November 18, 1925, the said appeal to the United States Board of Tax Appeals was dismissed on motion of counsel for the said commissioner on the ground that the assessment had been paid and therefore the said board was without jurisdiction.

XI. On May 7, 1927, plaintiff filed a claim, on Form 843, for refund of $6,345.76 (or such greater amount as is legally refundable). Said claim for refund was rejected on or

about February 15, 1928. The form of the claim for refund is not in controversy.

XII. The total tax as finally determined by the said commissioner is $72,916.66, all of which, with interest in the sum of $592.82, has been paid as aforesaid, and is retained by the United States. $688.32 was paid to the plaintiff as interest from December 27, 1921, to June 2, 1922, on the refund of $26,487.97 made in June 1922, as overpayment on plaintiff's 1918 income and profits tax.

The court decided that plaintiff was not entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

A so-called tentative return was filed by the plaintiff on March 12, 1919, and as the assessment in controversy was made on March 26, 1924, the plaintiff claims that the five-year period of limitations for the assessment of taxes had expired, and that the assessment was therefore illegal. The defendant contends that the limitations period did not expire until five years from June 16, 1919, when the completed return was filed, and this presents the first question for our consideration.

The Board of Tax Appeals has consistently held in a number of cases that the filing of the so-called tentative return did not start the running of the statute of limitations. See *Matteawan Mfg. Co.*, 4 B. T. A. 953. In this conclusion we concur for many reasons which will require a review of the preceedings which lead up to the filing of the tentative return, in order to ascertain its purpose and what was understood with reference thereto by both the Bureau of Internal Revenue and the taxpayer. The "revenue act of 1918," was not approved until February 24, 1919. It was quite plain to everyone that large business concerns and individuals having large business interests would have great difficulty in filing a return within the time required by law, and the Bureau of Internal Revenue would be deluged with requests for extension of time for filing returns. In fairness to the taxpayers, the most of these applications would have to be granted. The result would be to postpone the payment of taxes in such amount that the Government

might become embarrassed for want of revenues, for although the World War was over the Government was still being carried on at an enormous expense. In order to overcome this difficulty a plan was devised which provided the needed funds for the Government and certainly was a valuable concession to the taxpayers who brought themselves within its terms, by granting them an extension of time for filing complete returns. A circular was issued by the commissioner on February 27, 1919, giving the particulars of this plan as follows:

"Income taxpayers, both corporation and individual, were today granted by the Internal Revenue Bureau further relief with respect to the filing of their completed tax returns for 1918. The statement that the taxpayer is unable by March 15 to execute and file the complete return will be accepted, under the new procedure, as sufficient reason for extending for forty-five days the time for filing complete income and excess-profits returns, provided in every case the taxpayer pays on or before March 15, at least 25% of the estimated amount of the tax due."

It further stated that a supply of blanks for the use of taxpayers would be furnished for making a tentative return, and that the due date for the payment of taxes would not be extended nor would the taxpayer be relieved of interest if the amount paid was short of the amount eventually found due. The blank form furnished to and used by plaintiff was headed, "Tentative Return and Estimate of Corporation Income and Profits Taxes and Request for Extension of Time for Filing Return," and contained no statement whatsoever showing the gross income, deductions, invested capital, or other details necessary for a proper determination of plaintiff's tax liability. It merely estimated the tax to be $80,000.00 and accordingly $20,000.00 was paid on the taxes. It specifically requested an extension of time for filing the "return" and in this connection we are at a loss to understand what return could possibly be meant except the return required by law. The tentative return was not only not required by the law but there was no provision in the law for it. It was merely an invention of the commissioner and its purpose was to give the taxpayer an extension of time for filing the return required by law and at the same time

obtain the needed funds for the Government. The statute (section 250, act of 1918) provided that the tax shall be assessed within five years "after the return was due or was made." What return? The return not authorized by law and not referred to in the statutes? Clearly not. It was the return which the law required and which was not made by the tentative return. The return on which the statute of limitations is made to depend is the return required by section 239, which is very different from the so-called tentative return. In this connection we have no reference to returns where the taxpayer attempts to comply with the law but through error or mistake does not completely conform to its requirements. We have here a case where there was no pretense as far as making the return was concerned that the law was being complied with. There was merely enough done so that the commissioner would grant the extension of time.

If we look at the matter from the standpoint of equity between the Government and the taxpayer we can come to no other conclusion. The Government had five years in which to make an assessment on a different basis from the return, but surely this ought to be from the time when the taxpayer makes such a return as will enable the bureau to get at least some elementary knowledge as to how much tax he ought to pay. We think no one would contend that the taxpayer could merely file this tentative return and stop there without filing another and completed return but if the contention of the plaintiff is correct and this was a real return in the sense that the word "return" is used in the statute, nothing else was required.

It is argued that if the tentative return was not a return at all but merely an application or an agreement for an extension of time, the taxpayer was not bound to pay the first installment of his taxes until he filed the completed return. This argument overlooks the fact that the whole proceeding was a concession to the taxpayer beyond any requirement of the law, for the commissioner might grant or refuse an extension in his discretion, and having that right he could prescribe the terms on which an extension

should be granted. The proposition on the part of the commissioner was simply that if the taxpayer would file an estimate of his taxes and a request for extension of time for filing a return and make payment of one-fourth the estimated tax, the extension would be granted, and he had a right to make these requirements.

It is also argued that the Government is taking inconsistent positions; that it says at one time that the tentative return was a return and then when its interests require the contrary, says it is no return, but we find nothing inconsistent in its position. It has at no time stated that the so-called tentative return would be considered as the return required by law. On the contrary, the fact that an extension of time was granted for filing a complete return shows very clearly that it did not so consider it, otherwise no extension of time would have been necessary; and while we do not think it is material what the taxpayer understood, we are unable to see how it could have understood otherwise. The only meaning given in the dictionary to the word "tentative" which would at all apply to the situation under consideration is "experimental," and while this meaning may apply to some features of the case we are inclined to think that the common or colloquial meaning of the word "tentative" in such situations is with reference to something that will do or will answer for the time being but no further.

For the reasons above stated we concur in the view taken upon this question by the Board of Tax Appeals and by the Circuit Court of Appeals in the case of *Florsheim Bros. Dry Goods Co.* v. *United States*, 29 Fed. (2d) 895, and hold that the limitation did not begin to run until the completed return was filed and that the tax in question was assessed within the period prescribed by the statute.

Plaintiff also contends that the Commissioner of Internal Revenue having determined the tax liability of the plaintiff in April, 1922, was without authority to revise it, and that his later action making a new assessment was in excess of his authority, and the new assessment was therefore illegal.

We do not think it is necessary to discuss this question at length. The practice of the commissioner in making new and different assessments is of so long standing and has met

with such general acquiescence that this in itself constitutes a strong reason rejecting the contention of plaintiff. Ever since the Federal income-tax laws have been enacted, this practice has been going on. Congress has not merely acquiesced in it, but by various enactments has recognized the practice and has gone so far as to provide in the revenue act of 1921, which of course was not applicable to this case, a limitation on the reopening of cases. The cases cited by plaintiff with reference to the acts of some official of the Government whose action is by law made final have no application here. The determinations of the commissioner are not binding on the taxpayer but are merely a *prima facie* regulation. *Wickwire* v. *Reinecke*, 275 U. S. 101. The distinction is clearly made in *Fidelity & Columbia Trust Co.* v. *Lucas*, 7 Fed. (2d) 146, 149. In *Botany Worsted Mills* v. *United States*, 278 U. S. 282, it appeared that the taxpayer filed a return and paid the tax on the basis thereof. Subsequently an additional assessment was made by the bureau and was paid. The implication of the decision, which held the taxpayer could not recover the amount of the additional assessment, was that the commissioner could make changes in the original assessment; and it was expressly so held by the Board of Tax Appeals in *Appeal of James Couzens*, 11 B. T. A. 1040, a case where the Government officials had fixed the amount of the tax which was paid by the party assessed.

While the tax in question was assessed within the period of limitations it was not collected within the time fixed thereby and if this case is controlled by the rule laid down in *Bowers* v. *New York & Albany Lighterage Co.*, 273 U. S. 346, the tax involved was unlawfully collected and the plaintiff is entitled to recover. The defendant, however, contends that section 611 of the revenue act of 1928, which was passed subsequent to the decision in the *Bowers case*, so modifies the rule laid down therein that the court should deny a recovery in the case at bar and this contention presents a complicated question.

Section 607 of the act of 1928 provides:

"Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before

or after the enactment of this act) after the expiration of the period of limitation properly applicable thereto *shall be considered an overpayment* and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim." (Italics ours.)

Section 611 provides:

"If any internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this act) shall not be considered as an overpayment *under the provisions of section 607*, relating to payments made after the expiration of the period of limitation on assessment and collection." (Italics ours.)

There can be no question of what these sections mean. In plaintiff's argument it is said:

"Read together these sections provide that taxes assessed or paid out of time shall be credited or refunded to the taxpayer if a timely refund claim is filed *except* in cases of timely assessment made before June 2, 1924, and a claim in abatement was filed and collection of any part of the tax was stayed." With this statement we agree.

But plaintiff insists that they have no application to this case and that if so construed as to deprive plaintiff of the right of recovery herein the sections are unconstitutional.

Further in argument the plaintiff insists that section 611 has no reference to suits on the part of taxpayers and merely defines the authority of the officials of defendant in making refunds or credits. In support of this position it cites the cases of *Clinton Iron & Steel Co.* v. *Heiner*, 30 Fed. (2d) 542; *Erie Coal & Coke Co.* v. *Heiner*, 33 Fed. (2d) 135; and *Gile & Jenks* v. *Huntley, Collector*, 29 Fed. (2d) 209. All of these cases support the contention of plaintiff, but upon careful examination we are unable to agree to the rules laid down therein. In this connection, it should be noted that the case last above cited was reversed by a decision of the Circuit Court of Appeals to which reference will hereinafter be made.

In considering this contention, it should be observed at the outset that it is quite inconsistent with the meaning which is given by plaintiff's counsel to the two sections under consideration and with which meaning, as stated in the quotation from plaintiff's argument set out above, we agree. Our reasons for differing from these decisions cited by plaintiff are as follows:

It appears to us that Congress, by the provisions in the revenue act of 1928, was endeavoring to establish a rule whereby a condition of repose would be established and when taxes had been paid after the statute of limitations had run but which were due and ought to have been paid by the taxpayer before the expiration of the time of limitations, such taxes could not be recovered by the taxpayer. Whether this general observation may be correct or not, we think it quite clear that the construction of sections 607 and 611 adopted in the decisions cited on behalf of plaintiff is not correct, and that this will appear from a consideration of the logical effect of such a construction.

As we understand the argument in favor of the rule adopted by these decisions, the reason for the holdings therein is based largely upon the fact that in neither of these sections is there any reference to court proceedings, actions, or suits. But this is not necessary if the specifications made in the statute would make a suit unavailing.

Section 607 specifies the kind and nature of cases in which what is denominated an overpayment may arise by reason of the collection of taxes after the expiration of the period of the statute of limitations although such taxes were originally due and owing by the taxpayer. Section 611 makes an exception to the rule laid down in section 607 and in effect provides, with reference to cases included in this exception, that no "overpayment" shall arise. Necessarily it follows that if demand is made upon the collector for the refund or return of taxes paid after the running of the statute of limitations but which come under this exception, the collector is obliged to say that he is forbidden by law to repay them. It will be observed in this connection that the decisions cited by plaintiff assert that these sections are merely directions to the commissioner, collector, or other

officials of the Government and nothing more, and therefore notwithstanding their provisions suit may be brought and maintained to recover the tax. The doctrine laid down by these decisions as to cases which come under the exceptions of section 611 would create a situation that is very peculiar to say the least. If, for example, a demand is made upon a collector for repayment he must say that he is forbidden by law to make it, but if suit is begun against him for the same thing for which demand was made, it can be maintained and judgment can be entered against him. That Congress intended anything so inconsistent and useless we think no one will contend. When the language of the two sections is considered we think it will be seen there is nothing in them which requires such a construction. True, as before stated, there is nothing said with reference to courts or court proceedings, but court proceedings are not the basis upon which actions are maintained in actions like the one at bar. That depends upon the rights of the plaintiff and its rights are fixed by these sections. If the plaintiff's case came within the provisions of section 611, it had no right to repayment. This makes it necessary for us to consider as to whether its case is in fact included within the provisions of this section.

It is also contended by plaintiff that section 611 applies only to cases of voluntary payment and also to cases where "the collection of any part thereof (of the claim) was stayed," and that the collection of the taxes involved in the instant case was not in fact stayed.

As to the first contention, we think the language of the statute shows clearly that it is not well founded. The section relates to cases where a plea in abatement was filed which in itself would show that the tax was paid unwillingly. This contention also is contrary to the meaning given to the section by the report of the committee which presented the act to Congress, which will be hereinafter set out in connection with the second objection.

The second objection presents a more difficult question and for its proper consideration it will be necessary to examine that part of the report of the Ways and Means Committee on the revenue act of 1928 which explains the purpose of

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section 611 and the conditions which it was intended to meet. It is as follows:

"Prior to the enactment of the revenue act of 1924, it was the administrative practice to assess immediately additional taxes determined to be due. Upon the assessment, taxpayers were frequently permitted to file claims in abatement with the collector and thus delay the collection until the claim in abatement could be acted upon. If this practice had not been followed, undue hardship undoubtedly would have been imposed upon the taxpayer. It was supposed that there was no limitation upon the collection by distraint of the amount ultimately determined to be due. However, the Supreme Court has recently held in a case in which the period for assessment expired prior to the enactment of the 1924 act, that the period for collection was limited to five years from the date on which the return was filed. Decisions upon claims in abatement are being made every day. Amounts have been paid, are being paid, by the taxpayer even though the statute of limitations may have run. Exceptionally large amounts are involved. Accordingly, it is of utmost importance to provide that the payments already made should not be refunded. In order to prevent inequality, it is also provided that the amounts not yet paid may be collected within a year after the enactment of the new act.

"Your committee appreciates the fact that this provision will probably be subjected to severe criticism by some of the taxpayers affected. However, it must be borne in mind that the provision authorizes the retention and collection only of amounts properly due, and *merely withdraws the defense of the statute of limitations*. If it is determined that the amount paid is in excess of the proper tax liability, computed without regard to the statute of limitations, such excess will constitute an overpayment which may be refunded or credited as in the case of any other overpayment." (Report No. 2, 70th Congress, 1st session, p. 34.) (Italics ours.)

A reading of this excerpt from the report leaves no possibility of doubt about the intent and purpose which Congress undertook to embody in section 611. As before stated, the statute only applies to cases where the taxpayer had paid, after the running of the statute of limitations, taxes which had been rightfully due and owing to the Government. There is no equity in a claim for the refund of such taxes in any event, but the statute restricts the Government in retaining them to those cases only where as a favor to the taxpayer the Government had permitted the filing of a plea in abate-

ment and collection was stayed; or in other words, to those cases where the taxpayer by filing a plea in abatement had succeeded in delaying the case over the period of limitations and then sought to take advantage of the favor that had been granted him.

The argument made by the plaintiff is that during the period under consideration there was no provision for a plea in abatement in the law and especially that there was nothing in the plea of abatement that would, under the law, in any event operate as a stay upon the collection of the tax. This may be admitted, but if the statute applies only to taxes the collection of which was stayed by the plea in abatement it becomes a practical nullity, for it could only apply to a small number of cases arising under the act of 1924, which provided for the filing of a plea in abatement and bond to stay proceedings, if indeed it had any application at all. The language of section 611 and the statement made in the report, we think, forbid any such construction. The section is not limited to cases where the collection is stayed by the filing of a plea in abatement, but simply to cases where the collection "was stayed," and we think the words "was stayed" were purposely used instead of "is stayed." Congress intended the act to apply to the conditions set out in the report showing that in numerous cases taxpayers had filed claims in abatement and delayed the collection until the claim in abatement could be acted upon. In this case the collector, in March, 1924, demanded payment of the tax in controversy and the plaintiff filed a plea in abatement, whereupon nothing more was done until February, 1925, when the commissioner passed on the claim in abatement and allowed it in part, of which the plaintiff was notified, and in March of the same year plaintiff filed an appeal from the deficiency fixed by the last determination to the United States Board of Tax Appeals. No further action was taken by the collector until June, 1925. It thus appears that plaintiff was granted a stay upon filing the plea in abatement. The word "stay" as used in ordinary conversation means to hold from proceeding, to postpone, or to keep back. In law, it generally means to suspend by judicial proceedings. We think it was not used in the statute in its strict legal meaning but in its ordinary sense and when we give

it that meaning it is quite clear that the collection was stayed by the collector or commissioner, and there can be no doubt but that in so holding we are following the intention of Congress as expressed in the report to that body which explained the meaning and purpose of section 611. To put the construction on the statute contended for by plaintiff requires us to attribute to Congress the absurdity of declaring that unless a stay was brought into effect by an act which did not and could not produce a stay, the statute would not operate and thus the statute would nullify itself. It needs no citations to show that it is our duty to so construe the statute as to give it some force and effect when this can be done consistently with its language. The construction given, in our opinion, not only accords with the language used, but is the only construction that could properly be given.

These conclusions are supported in part, if not entirely, by the opinion rendered in the case of *Clyde G. Huntley, Collector*, v. *H. S. Gile & W. T. Jenks*, by the United States Circuit Court of Appeals for the ninth circuit, 32 Fed. (2d) 857, reversing *Gile & Jenks* v. *Huntley*, 29 Fed. (2d) 209, cited by counsel for plaintiff; and also the case of *Regla Coal Company* v. *Bowers*, decided by the District Court, Southern District of New York, November 13, 1929, C. C. H. D.– 9415, p. 8888. The decision in the case last cited contains an elaborate discussion of the proper construction of sections 607 and 611 and the Constitutional question raised in connection therewith. On all of these matters the same conclusion is reached as is set forth in this opinion. In the *Huntley case*, *supra*, attention is called to the fact that if it be held that the statutory provisions have no application to taxes collected after the period of limitations has expired, the statute is useless and meaningless. There would of course be no occasion or use whatever for the statute in cases where the tax was collected prior to the expiration of the period of limitations. The only reason for enacting the statute in question was the fact, as shown by the report of the committee, that "amounts have been paid, are being paid, by the taxpayer even though the statute of limitations may have run." It is quite evident that the intention of the

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lawmakers was that the statute should apply to taxes collected after the statute of limitations had run.

Objection has been made that the construction contended for by defendant is retroactive and that a statute ought not to be construed as having retroactive application unless it appears that Congress had such intent. The provisions of the statute under consideration are retroactive in form and if anything further is needed to show the intent of the legislative body enacting it, it will be found in that portion of the report accompanying the act of 1928 which has already been set out in this opinion. The report makes it clear that the sole purpose of the provision was to obviate the effect of the decision in the case of *Bowers* v. *New York & Albany Lighterage Co.*, *supra*, and to apply to cases arising under prior acts.

One other point remains to be decided. It is further contended that if the statute is construed in accordance with our holding, it is unconstitutional and invalid for the reason that it would deprive plaintiff of a vested right. If plaintiff acquired such a right, it was by virtue of the statute of limitations. In *Huntley* v. *Gile & Jenks*, (C. C. A. 9th Dist.) *supra*, it is said, "no vested right accrues to the taxpayer out of the running of the period of limitation for the collection of a valid tax," citing *Rafferty* v. *Smith, Bell & Co.*, 257 U. S. 226; *United States* v. *Heinszen & Co.*, 206 U. S. 370; *Collector* v. *Hubbard*, 12 Wall. 1; *Haight* v. *United States*, 22 Fed. (2d) 367; *Campbell* v. *Holt*, 115 U. S. 620; *Railroad Co.* v. *Alabama*, 101 U. S. 832; *Beers* v. *Arkansas*, 20 How. 527; *West Side Co.* v. *Pittsburgh Co.*, 219 U. S. 92; *Brushaber* v. *U. P. R. R. Co.*, 240 U. S. 1; *Lynch* v. *Hornby*, 247 U. S. 339, 343.

These authorities would seem to dispose of the point last considered, but before concluding attention is especially directed to another rule which, in our opinion, effectually precludes this court from considering plaintiff's claim.

Nothing is better settled than the principle that the legislative branch of the Government has complete right and authority to determine when, how, and where the Government shall be sued and whether it can be sued at all. If Congress sees fit to provide that a suit can not be maintained

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for taxes paid, it is clear (at least where the taxes were rightfully imposed) that they can not be recovered. "Where a statute creates a right and provides a special remedy, that remedy is exclusive." *United States* v. *Babcock*, 250 U. S. 328, 331. The constructions which we have heretofore put on sections 607 and 611 of the revenue act of 1928, specify in what cases suits may be maintained to recover taxes paid which in their origin were valid and due from the taxpayer. If we are correct in this, then by clear implication only such suits as are permitted by these two sections can be maintained on the ground that the tax had been paid after the running of the statute of limitations, and that such was the intention of Congress we think admits of no doubt. As we find that plaintiff's claim does not belong to a class for which suit may be brought, this court has no authority or jurisdiction to approve it, regardless of whether the rights of the plaintiff had vested or not.

It follows that the petition of the plaintiff must be dismissed and it is so ordered.

WILLIAMS, *Judge*, and LITTLETON, *Judge*, did not hear and took no part in the decision of this case.

GRAHAM, *Judge*, and BOOTH, *Chief Justice*, concur.

SUPPLEMENTAL OPINION ON MOTION FOR NEW TRIAL

GREEN, *Judge*, delivered the opinion of the court:

On the submission of this case it was contended by counsel for plaintiff that the tax in this case having been determined under the so-called relief provisions of sections 327 and 328 of the act of 1918, the matter of the amount of the tax was governed by the discretion of the commissioner in applying these provisions, and that having once determined the amount, he could not by a second and later determination increase the amount which he had originally fixed for the tax, and as the matter was within the discretion of the commissioner, his original determination was final and conclusive both upon him and this court. It is now urged by brief in argument on the motion for a new trial that this

point receive further consideration, and as there are other cases on the docket involving the same question, it has been thought best to file this opinion supplemental to the one heretofore rendered.

At the outset, to avoid confusion of thought, it should be kept in mind that the question under consideration is not whether the commissioner's action under the sections of the law above referred to is reviewable by this court. That question was settled by the *Williamsport Wire Rope Co. case*, 277 U. S. 551, wherein it was held that this court had no jurisdiction to review his decision in such cases. The question in the case at bar is whether the commissioner had authority to redetermine, change, or modify his original determination or reassess an additional amount against the plaintiff. Counsel for plaintiff, however, taking the *Williamsport Wire Rope Co. case*, *supra*, as the basis for his argument, contends that the action of the commissioner was final and for that reason could not be changed even by himself when once it was made. It would seem a rather surprising doctrine that if the commissioner discovered the next day or the next month that he had made a gross error that he had no authority to correct it, but for reasons hereinafter stated we shall not discuss this point. Plaintiff's counsel cites a number of cases which he claims hold that when a tribunal or an official is authorized to act with discretionary power, when that authority has once been exercised, no further authority exists; and that where lawful authority is delegated to an administrative officer, his acts in an administrative way are not subject to change or review. For the purposes of the argument, it may be conceded that where the acts of the officer are administrative in their nature a different principle prevails with reference to the review thereof than when he acts in a quasi-judicial capacity. Nevertheless, it is uniformly held that the decisions of such tribunal or officer may be set aside on the ground of fraud or mistake, and it has also been held that an administrative officer whose decision is conclusive upon the courts may review and change his original decision, provided that no rights have become vested such as would arise from the issuance of a patent, a certificate, or something of that nature. *Love* v.

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Flahive, 205 U. S. 195, 199. Plaintiff also contends that in such event the burden of proof is upon the party seeking to have the decision changed to establish the fraud or mistake, and that even then it can only be done by a court and not by the officer or tribunal itself. The cases cited to support this rule would seem to show that it only applies when the Government is seeking to set aside the act of one of its own officials. In *Austin Co.* v. *Commissioner of Internal Revenue*, 8 B. T. A. 628, affirmed 35 Fed. (2d) 910, this particular question was involved in a case of the same nature as the one before us. With reference to the additional assessment made by the commissioner, the court said:

"There is a presumption that he performed his duty." (Citing *United States* v. *Chemical Foundation*, 272 U. S. 1.) And with reference to the claim that the commissioner lacked authority to make any further assessment, the court also said:

"Even though there was lack of authority to make such assessment upon a changed view of the same facts, there was not lack of authority to make it where there was fraud or mistake of law or fact in the original assessment. In this situation the burden was on the petitioner to show that the commissioner's action grew out of circumstances which did not warrant it."

But it would require too much time and space to review the decisions recited on behalf of plaintiff, and we do not think it necessary to analyze them for the reason that in our opinion they have no application whatever to the case at bar, and we can rest our decision firmly on other grounds. Our reasons for this holding are set out below.

A full consideration of the question now under consideration requires that we should go somewhat into the history of the income and profits tax system in force at the time when the tax in question was assessed. The first experience of this country with an income tax was at the time of the Civil War and for a short period thereafter. During that period the rates of the tax compared to those now in force were very low and the administrative provisions of the law were few and simple. The recovery of an amount overpaid could only be obtained in the same manner as an overpay-

ment of any other tax, that is, when the payment had been made under protest and suit brought to recover the amount overpaid. This income tax law was repealed and finally adjudged unconstitutional. In 1913, the Constitution having been amended, another income tax law was placed upon our statute books. Here again the rates were, comparatively speaking, quite low, the administrative provisions few and and simple, in no case was the act of the commissioner discretionary, and no changes were made in the method of obtaining refunds in proper cases. After this country became involved in the World War it became necessary to greatly increase the rates of income and profits taxes, which was done first by the act of 1916 and then by the act of 1918, under which the taxes in question in this case were levied. It became evident—in fact, was a matter of common knowledge—that the application of these high rates through a tax with which neither the Government officials nor the citizenship of the country were familiar gave rise to numerous errors, inequalities, and hardships, both in favor of and against the taxpayers, which called for action by Congress. The result was that an entirely new body of laws was built up under which, while the administrative proceedings were in part governed by authorized Treasury regulations, for the most part they were ordered and directed by statutes in a manner which compared to the methods theretofore existing may be said to be exceedingly specific. These statutory provisions applied to the income and profits taxes. To what extent they applied to other taxes it is not necessary for us to herein determine. The special object and purpose thereof was to make clear and plain, so far as possible, the procedure in administering the income and profits taxes, and they are to be found in connection with the revenue acts which imposed them. These acts made great changes in the proceedings for the assessment and collection of taxes and also for the refund of taxes erroneously or wrongfully collected. For the first time they provided for limitations upon the assessment and collection of taxes, for the refund of taxes although no protest had been made when they were paid, and eventually gave the right to have the question of the taxpayer's liability judi-

cially determined without having first paid the tax. So also while Congress was thus making the path of the taxpayer easier and more definite, it prescribed limitations on his right to object to assessments and claim refunds. It was also important that the Government as well as the taxpayer should be protected from errors and mistakes that might enter into the assessment and collection of taxes.

The ultimate question in the case is not whether the decision of the commissioner was final, but when it became final; and that, as we shall see, was only when the statute of limitations had run against the Government. With the evident purpose of making it clear when the decision of the commissioner became final, Congress, in the act of 1921, included a comprehensive and sweeping provision applying to all cases under the income and profits taxes with reference to the time when a case was finally settled, showing definitely when assessments made by the commissioner became final, so that no further action could be taken. As the assessment which plaintiff claims was final was not made until 1922, this provision unquestionably applied thereto. It is found in a separate title of the act, headed in manner and form as set out below:

"TITLE XIII.—GENERAL ADMINISTRATIVE PROVISIONS."

This major division was also subdivided, and in one of these subdivisions we find section 1312 of the same act which, in our opinion, clearly controls the judgment in this and similar cases. This section with its subhead is set out below in exactly the form that it appears in the act as passed by Congress:

"FINAL DETERMINATIONS AND ASSESSMENTS

"SEC. 1312. That if after a determination and assessment in any case the taxpayer has without protest paid in whole any tax or penalty, or accepted any abatement, credit, or refund based on such determination and assessment, and an agreement is made in writing between the taxpayer and the commissioner, with the approval of the Secretary, that such determination and assessment shall be final and conclusive, then (except upon a showing of fraud or malfeasance or

misrepresentation of fact materially affecting the determination or assessment thus made) (1) the case shall not be reopened or the determination and assessment modified by any officer, employee, or agent of the United States, and (2) no suit, action, or proceeding to annul, modify, or set aside such determination or assessment shall be entertained by any court of the United States."

This section (1312) appeared for the first time in the 1921 act but was repeated *verbatim et literatim* under the same title and subhead in the revenue acts of 1924 and 1926 except that the words "without protest" are omitted. We think this statute so plain that "he who runs can read." A taxpayer had only to look at these headings to find under the head of "final determinations and assessments" whether the assessment which had been made against him was final. In *Holmquist* v. *Blair*, 35 Fed. (2d) 10, the court said with reference to this provision:

"Section 1312 provides that, where the commissioner has determined and assessed the tax and without protest it has been fully paid or a refund accepted and a written agreement entered into by the commissioner and the taxpayer (approved by the Secretary), 'such determination and assessment shall be final and conclusive' except for fraud, malfeasance, or misstatement of material fact. Sections 1309 and 1312 leave no doubt of the authorized power in the commissioner to make reexaminations, redeterminations, and reassessments. From the above sections of the act it is clear that Congress authorized reexaminations by the commissioner, and that the only limits thereon are that such must be made within four years (section 250 (d)) and must be after written notice to the taxpayer after investigation of the necessity for such reexaminations. Section 1312 points out the way and the only way in which an assessment may be made final before expiration of the four-year period. 'When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.' *Botany Mills* v. *United States*, 278 U. S. 282, 289."

Section 1309 referred to reexaminations.

In the same decision, *Woodworth* v. *Kales*, 26 Fed. (2d) 178, is reviewed and doubt is expressed as to whether, under the particular facts in the case, a contrary doctrine is held therein, but the court in its opinion says with reference to the case last cited that it prefers the rule laid down in *Loewy*

& Son, Inc., v. *Commissioner*, 31 Fed. (2d) 652, in which the same construction is placed upon section 1312 of the revenue act of 1921.

We do not overlook that in *Holmquist* v. *Blair*, *supra*, and *Loewy & Son* v. *Commissioner*, *supra*, the assessment was not made under an administrative provision, but the line of argument used in the decisions is equally applicable to the case at bar. It should be noted also that in the *Austin Co. case*, *supra*, the assessments were made under a provision of the act of 1917 similar to the so-called relief provisions of the act of 1918 under which the assessments were made in the case at bar, and the act of the commissioner was therefore administrative, but the right of the commissioner to make a second assessment was upheld.

If it be claimed that prior to the passage of this provision of the law the first determination of the tax by the commissioner under the relief provisions was final, this affords no reason for such cases not being included within the purview of the section under discussion if Congress intended to exempt them from its provisions, but rather furnishes a conclusive argument that Congress did not so intend. Assuming for the purpose of the argument that prior to the passage of section 1312 such acts have been final, it makes it the more evident that if Congress had intended that this rule should continue, it would have so stated in this section which was three times enacted, and which we might say assumed by everyone to be all inclusive in its provisions. All the works on income taxation so treat it, and this has been the practice followed by the department, which has repeatedly reviewed its decisions upon special assessments under the relief act, upon the request of taxpayers.

It is said that when the commissioner determined the tax under the relief provisions of the act of 1918, and not only found that the plaintiff had been overassessed but sent the plaintiff a check for the amount of the overassessment, which plaintiff accepted, the whole matter was then settled. But section 1312 provides for exactly this kind of a case, and that such a settlement is not final unless an agreement is

made in writing between the taxpayer and the commissioner as provided therein.

It should also be noted that in section 273 of the revenue acts of 1924 and 1926 Congress provided that the commissioner might reverse his action in the case of an abatement, refund, or credit and reassess and collect the amount. It expressly recognizes that in arriving at the correct tax to be collected there may have been additional assessments or collections, abatements, refunds, and credits and clearly indicates that a refund, erroneous or otherwise, does not bar action by the commissioner within the statutory period provided by law. An amount erroneously refunded becomes none the less a tax because of that fact.

Since the submission of the case at bar, we have been favored with further argument on this same question in the case of *Taft Woolen Co.* v. *United States*, No. J–61. In the brief on the case last cited, attention is called to provisions of sections 204 (b) and 234 (a) (8) of the revenue act of 1918 which, it is said, were reenacted in the revenue act of 1921, and that there would be no necessity for these provisions, which are general in their nature, being enacted if the commissioner had power otherwise to redetermine the tax in all cases. There might possibly be some force in this argument if the particular provisions of these two sections had been reenacted in their entirety. Such is not the case. The part of these provisions which had general application, namely, the words " the taxes imposed by this title and by Title III," was omitted and other changes made when the sections to which reference is made were reenacted in the act of 1921, doubtless for the reason that Congress was making express provision elsewhere with reference thereto in section 1312 of the same act which we have set out above. As changed in the act of 1921, these provisions apply only to particular cases and state that in such cases the commissioner not only may reexamine the return, as he could in all other cases, but that he " *shall* " do so in certain instances. (Italics ours.) Also, in the argument in the *Taft Woolen Co. case, supra*, reference is made to sections 222 (a) and 222 (b) of the act of 1918 which it is said were reenacted in the act of 1921. An examination thereof will show that these provisions applied to

amounts claimed by credits by the taxpayer by reason of taxes paid in foreign countries, or to refunds received therefrom and to nothing else. It was clearly necessary that a special provision should be made with reference thereto in a separate paragraph. It is also said that a Treasury regulation prevented the reopening of a case under circumstances such as existed in the case at bar, but a casual examination of the Treasury regulation with reference to the reopening of cases makes it plain that it applied only to cases where the taxpayer was making application to have the case reopened.

For the reasons above stated we hold that the commissioner was not precluded from making a reassessment within the period prescribed by the statute of limitations, which in this case had not expired. It follows that the motion for a new trial must be overruled and it is so ordered.

WILLIAMS, *Judge*, and BOOTH, *Chief Justice*, concur.

LITTLETON, *Judge*, concurring:

On the theory that the court has jurisdiction to go into the question of the authority of the commissioner to reconsider a determination made by him under sections 327 and 328 and change his first determination and reassess and collect a portion of the profits tax theretofore determined under these sections, and refunded, I agree with the foregoing opinion and the conclusion reached therein, but I think the claim of the plaintiff should be denied on the ground that the court is without jurisdiction to pass upon the question of the authority of the commissioner in this case.

This case relates entirely to a matter arising under the special-assessment provisions of the statute which confer discretionary power in the commissioner to determine the facts and the rate of profits tax through a comparison of the plaintiff with other corporations specified in section 328. It appears that the plaintiff made a return for the year 1918 and paid a total income and profits tax of $91,944.37. This return showed a total net income of $124,488.61, the normal tax upon which was $4,158.30 and the excess-profits tax, as computed under section 301 of the revenue act of 1918,

was $87,836.07. Thereafter plaintiff made application to the commissioner for computation of its profits tax under section 328 of the said act, known as the special-assessment provision, claiming that the profits tax of $87,836.07 paid was too high and worked upon the plaintiff an exceptional hardship as compared with other corporations similarly circumstanced. The commissioner, in his discretion, concluded that this application should be granted, whereupon he made a computation under the special-assessment sections and on June 21, 1922, increased the net income of the plaintiff to $125,-219.28, but concluded that the excess-profits tax, when determined under section 328, should be $57,736.39 instead of $87,836.07. As a result, $26,487.97 of the profits tax paid on the return was refunded. In March, 1924, the commissioner reconsidered his action taken under the special-assessment provisions and made another determination of the amount of plaintiff's profits tax under these provisions by comparison with other corporations and concluded that he had made a mistake; that the correct comparison and computations showed a profits tax of $73,368.23 and that, as a result, he had refunded $13,756.02 too much. No change was made in the net income. He recomputed and reassessed this amount and upon receiving notice thereof the plaintiff filed an abatement claim and a brief. Upon further consideration the commissioner made a further comparison under the special-assessment provisions and upon a further recomputation allowed the abatement claim for $6,354.76 and rejected it for $7,410.26. In August, 1925, the collector made demand for the payment of the last mentioned amount, and in September, 1925, the plaintiff paid it, together with interest in the amount of $592.82. In this suit plaintiff asks judgment for the amount upon the ground that the commissioner's action on June 21, 1922, under the special-assessment provisions refunding a portion of the excess-profits tax shown upon the return, was final and that he was without authority to reassess and collect any portion of the amount so refunded.

To go into the question whether the commissioner had authority to change his determination and reassess a portion of the tax refunded under the special-assessment provisions

would be the same as inquiring into the correctness of such determination. The amount which the commissioner finally determined the plaintiff owed was less than the tax imposed by section 301. The entire matter was embraced within the provisions of section 328. Plaintiff claims that the amount refunded lost its character as a tax and could be recovered only by a suit in which it would be incumbent upon the Government to prove that a refund was erroneous. In such a situation the court would not have jurisdiction to go into the matter, *Williamsport Wire Rope Co.* v. *United States*, 277 U. S. 551. And, however egregious the mistake in the first determination might have been, no portion of the amount erroneously repaid could be recovered by the Government.

GRAHAM, *Judge*, concurs.

AMERICAN DREDGING CO. v. THE UNITED STATES

[No. H-523. Decided December 2, 1929]

On the Proofs

Contract; dredging operations; failure to exercise care; damage to adjacent structures; burden of proof.—Where in a contract for dredging the contractor is to use reasonable and proper care so as to assure the stability of adjacent structures and is to make good all damage resulting from his operations, suit thereon for such damage imposes upon him the burden of establishing observance of reasonable and proper care, and where the dredging is done by methods of measurement not in accordance with good engineering practice, and an adjacent sea-wall is thereby destroyed, he is liable in damages.

The Reporter's statement of the case:

Mr. George R. Shields for the plaintiff. *Mr. George A. King* and *King & King* were on the briefs.

Mr. Edwin S. McCrary, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff, American Dredging Company, is a corporation, organized under the laws of the State of Pennsylvania, with principal office and place of business in the city of Philadelphia in said State.

II. On July 29, 1926, the American Dredging Company entered into a contract with the United States, represented by Luther E. Gregory, Chief of the Bureau of Yards and Docks, Navy Department, for the performance of certain dredging work as therein specified. A copy of said contract, with the specifications thereunto pertaining, is attached to plaintiff's petition herein and is by reference made a part hereof.

III. The plantiff proceeded with the work expeditiously and in due course completed the same. It was paid on account from time to time. There remains a balance of the contract price amounting to $30,499.13, which is still unpaid.

IV. The work to be done included, among other things, dredging to a depth of 30 feet specified areas of what is known as "the reserve basin" at the League Island Navy Yard. One side of said basin was bounded by what is known as the Broad Street sea wall, a timber, concrete, and stone structure erected in 1899–1900. The specifications required dredging to a depth of 30 feet, overdepth of 1 foot allowable, to a line 20 feet distant from the sea wall, and that the depth at the base of the sea wall should not exceed 20 feet. To maintain a depth of not to exceed 20 feet at the base of the sea wall it was essential to see to it that a depth not in excess of 25 feet occurred at a distance of 10 feet from the sea wall, 30 feet being the maximum at 20 feet from the wall, and the contract so provided.

There were markers on the north and south piers 20 feet from the sea wall, about 300 feet away. The captain of the dredge relied wholly upon these markers in ascertaining distance from the sea wall, locating his dredge by sighting thereto and therefrom. The markers relied upon were not placed upon the piers by the captain, and who placed them there is not shown in the evidence. A Government inspector representing the public-works officer was on the dredge at

least half of each working day. The dredge operated from 6 a. m. to 6 p. m. each day, and the inspector with other work to do spent at least half of each day on board the dredge.

V. The work of dredging was performed by a dredge of the clamshell bucket type, which opened on a middle hinge and spread when opened to a width of about 8 feet. The captain of the dredge was a man of 25 years' experience in such work, and the operator of the dredge had had 20 years' experience. The captain of the dredge previous to commencing work called the attention of the officer in charge to the danger of the sea wall collapsing. This he did without any examination of conditions and as a mere matter of precaution.

VI. On March 10, 1927, dredging operations were in process from the north to the south parallel to the sea wall. About 1.30 p. m. the captain of the dredge observed cracks in the wall directly in front of him, about 128 feet from the north end of the wall. By 4.30 p. m., except for a short section thereof, at least 118 feet of the sea wall entirely collapsed and was projected outwardly into the water. At this time the dredge was located between 20 and 25 feet, according to the ranges used, from the sea wall. Dredging operations were immediately suspended and soundings at the point of the dredge were taken, disclosing a depth of at least 28 feet.

Officials of the navy yard were promptly notified and at once came to the scene of the disaster.

On the day following, i. e., March 11, 1927, the officials of the navy yard made soundings over the area dredged, except that portion filled in by the collapsed material from the sea wall and the filling carried in by the wall. These soundings disclosed overdepth on the line 10 feet from the wall of from 1½ to 3½ feet, a few of the soundings being taken in the "collapsed" area. Previous to the dredging operations involved in this case, soundings had been taken and recorded of the area involved, and were available to disclose the situation before and after the collapse of the wall.

There were no other dredging operations in process at or near the point of the collapsed sea wall at the time or immediately before the disaster.

VII. The dredging contract was entered into for the purpose of removing from the specified area silt and other deposits which had accumulated in the basin, since it had been previously dredged. The amount of this deposit was between 15,000 and 20,000 cubic yards. Soundings had been made and platted to ascertain the amount of the deposit and to be available in comparison with later ones to be taken after the completion of the contract, in fixing the basis of pay to the contractor.

The collapse of the sea wall was due to dredging operations and attributable proximately to overdepth dredging. Not all the sea wall in place at the time of the beginning of dredging collapsed, though the great bulk of dredging operations had been done.

VIII. The sea wall consisted of a timber relieving platform about 35 feet wide, founded on timber piles, the top of the platform being about 2½ feet above mean low water. At the front of the platform was a concrete wall about 9 feet high, surrounded by a fancy coping or parapet wall of broken marble. Previous to March 10, 1927, it had given no evidence of instability and was in constant use, and a basin depth of 30 feet had been determined upon two years before the wall was erected.

IX. Subsequent to the collapse of the sea wall, a Navy board was assembled to ascertain the cause of the collapse, examined witnesses, and made its report. The plaintiff was immediately notified of the findings of the board and called upon to replace the wall or respond in damages. After some correspondence the plaintiff disavowed responsibility for the same, and the defendant advertised for competitive bids to build a new wall. The Regan Construction Company was the lowest bidder and received the contract, the contract price being $19,120. The contract and specifications of the Regan Construction Company called for a sea wall in many respects different from the collapsed wall. In fact, it called for a new wall much stronger, but not of a much different type. Changes were made in the Regan

contract during the course of construction; some increased and others diminished the cost of performance, the final contract price being $17,545. The defendant recognized the difference in cost between the old and new sea wall and allowed the plaintiff a deduction from the Regan contract price of $2,125, which amount was arrived at by taking into consideration the changes which increased and decreased the cost of performance of the Regan contract, and the sum of $550 deducted is the supposed difference in the cost of piling, etc. The court finds the difference in the cost of the new wall and the collapsed wall to be $1,550.

A stipulation is filed by the parties hereto that the cost of replacing telephone wires, cables, and connections, ascertained from amounts paid therefor, was $2,401.76, making a total replacement cost of $18,396.76.

The defendant's counterclaim alleges a governmental loss of $19,120. This amount was doubtless stated prior to the filing of the stipulation as to costs of wire reinstallation. It is by the record proven to be erroneous, and to the extent of the error amended.

The court decided that plaintiff was entitled to recover $30,499.13, less the amount of defendant's counterclaim, $18,396.76, or $12,102.37.

BOOTH, *Chief Justice*, delivered the opinion of the court:

The plaintiff is a Pennsylvania corporation. On July 29, 1926, it entered into a contract with the Navy Department to do certain dredging in what was designated as "the reserve basin" at the League Island Navy Yard, Philadelphia, Pa. The reserve basin, as its name implies, had its depth impaired by an accumulation of silt and other deposits due to various causes. The contractor's obligation was to remove these deposits by dredging the basin in specified areas to a depth of 30 feet to a line 20 feet from and parallel to a sea wall which skirted the basin on the north, the wall being known as the "Broad Street Sea Wall." The specifications provided that a depth of but 20 feet should be maintained at the sea wall, thereby requiring dredging operations to proceed on the basis of a depth of not to exceed 25 feet

from a point 10 feet from the sea wall, thereafter attaining at the 20-foot line a depth not to exceed in any event 31 feet, one foot overdepth being allowed the contractor.

On March 10, 1927, while the plaintiff was dredging the basin at a point 20 or 25 feet opposite a section of the sea wall, the captain observed cracks in the wall and soon thereafter about 118 or 120 feet of the wall collapsed and fell outwardly into the water. This suit is the result of this incident. The defendant concedes that a balance of the contract price, viz, $30,499.13, has not been paid to the plaintiff. The reason for withholding it appears from a counterclaim filed herein setting up a charge against the plaintiff for the cost of replacing the collapsed wall. If the counterclaim is not sustainable, the plaintiff is entitled to judgment for the admitted balance.

The contract contained, among many others, the following express conditions:

"1–02. *General description.*—All the sections (with one exception below 18 feet) to be dredged have been dredged previously to depths equal to or greater than now required. The material to be removed is believed to consist of river silt, sand, etc., which has been deposited over the section since the last dredging.

"2–06. *Maintaining safety of structures.*—The contractor shall use reasonable and proper care in the prosecution of his work so as to assure the stability of piers, bulkheads, and other structures lying on or adjacent to the site of the work in so far as they may be jeopardized by the operations of dredging and on account of moving or mooring of equipment.

"2–08. *Damage.*—The contractor shall make good all damage resulting from his operations and he shall leave all structures in condition as good as existed before the work was begun.

"2–13. *Character of material.*—As dredging to the required depths has previously been performed, it is believed that the material will consist of silt and sand which has been deposited by the river current.

"2–15. *Method of measurement.*—The quantity of material dredged will be determined by the Government from measurements made in original position using a sounding lead, with an enlarged base or plate to restrict penetration.

"2–17. *Accuracy of dredging operations.*—To cover inaccuracies of dredging processes, payment will be made for ma-

terial actually dredged to a depth of 1 foot below the depth required.

"2-20. *Payments*.—The total quantity for which payment will be made will be determined from the results of the initial and final surveys, regardless of whether or not extra dredging has been made necessary by the deposit of material on areas already dredged. No payment will be made (a) for material dredged outside the designated areas as enlarged by the slopes specified, (b) for material dredged in excess of 1 foot below the minimum depth designated, nor (c) for material dredged but not deposited in accordance with the specification.

"21. *Contractor's responsibility*.—The contractor shall be responsible for the entire work contemplated by the contract, and every part thereof and for all tools, appliances, and property of every description used in connection therewith. All methods of work, tools, appliances, and auxiliaries of all descriptions shall be safe and sufficient, and, if found by the officer in charge not to be so, shall be made satisfactory by the contractor without delay. The contractor shall specifically and distinctly assume all risks connected with the work, and shall be held liable for all damage or injury to property used or persons employed on or in connection with the work and all damage or injury to any person or property wherever located, resulting from any action or operation under the contract or in connection with the work, and undertakes and promises to protect and defend the Government against all claims and to reimburse it for any outlay on account of any such damage or injury."

The plaintiff in its brief and argument predicates its right of recovery; first, upon a strict compliance with the contract respecting depths dredged and the principle of law established in the case of *Spearin* v. *United States*, 248 U. S. 132, and kindred cases, specifically cited. If the contractor complied in every respect with the specifications and the record establishes that the collapse of the wall was due to faulty plans and specifications and not overdepth dredging, the rule in the *Spearin case* is applicable. As the Supreme Court said in the *Spearin case*, "If the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for consequences of defects in the plans and specifications." The difficulty the advanced contention encounters is not one of law but of fact. The record is one requiring the application of what the court

deems, under the rules of evidence, the best and most convincing testimony to sustain or contradict pertinent and material facts. The existence of a possible doubt as to the cause of the collapse is removed by what was going on when it occurred and what had been done just prior thereto. The plaintiff and no other was dredging near the sea wall and had been for some time previous likewise engaged in dredging the reserve basin. No proof obtains that the sea wall itself was dilapidated, inherently weak, and precariously near to a collapse because of its age, construction, or previous usage so that the range of investigation and determination is limited to the questions of faulty plans and overdepth dredging. What, then, was the situation respecting these two issues? The plaintiff by simple observation must have known the care essential to observe in dredging in an area adjacent to a structure of the character of the sea wall and within limits so comparatively small. Experience warned the contractor of the exacting character of his undertaking and the prime necessity of proceeding with the utmost caution to obtain exactness. It was not difficult to ascertain with indisputable exactness the distance of 20 feet from the sea wall. Instead of resorting to an indisputable method the contractor relied upon two markers, one at the north and the other at the south side piers, neither of which he had placed there himself; and who did place them was unknown to him. The markers were from 250 to 300 feet away and the position of the dredge boat placed with reference thereto by sighting. If this is good engineering practice it is not sustained by the record, and to the court it is impressive and convincing, in an undertaking of the restrictive character here involved, as a lack of the exercise of "reasonable and proper care" exacted under the terms of the contract. The obligations of the contract warned the contractor of danger to the stability of "structures lying on or adjacent to the site of the work, in so far as they may be jeopardized." This obligation necessarily imposed the exercise of care and caution with respect to the structures enumerated, and in a suit upon the contract the burden of establishing observance of the same is upon the plaintiff. To take the risk of ascertaining distance by a method so crude as herein resorted to deprives the record of

sufficient proof to sustain the contention that no dredging was done except as the contract expressly provided. On the other hand, the defendant has proven by positive evidence that soundings made immediately after the collapse disclosed overdepth dredging within prohibitive distances of from 1½ to 3½ feet. The plaintiff challenges the probative force of this testimony because the blue prints do not show soundings directly opposite and adjacent to the collapsed wall. It was manifestly impossible to make soundings directly adjacent to the wall, for the basin at that point was filled in by the collapsed wall and the material carried in with it. The soundings made approached this distinct area as closely as possible and two at least were within the area. In our opinion overdepth dredging caused the collapse.

There is no proof of record showing faulty plans and no evidence to sustain a finding that the specifications themselves were such as to render it impossible to attain the prescribed depths without endangering or causing the collapse of the wall. On the contrary, the record is positive that two years in advance of the original construction of the wall a depth of 30 feet for the reserve basin was determined upon and the basin brought to that depth in accord therewith. The wall was constructed and remained in place until March 10, 1927. In addition to this fact, notwithstanding overdepth dredging in the area adjacent to the collapse, the sea wall there remained in place. Clearly the burden of establishing the plaintiff's contentions has not been met by the plaintiff, and the express terms of the contract prevent the giving of the relief sued for.

The plaintiff declined to replace the wall. The defendant did replace it. In so doing a somewhat more stable structure was erected. The margin of safety was increased. It is obviously difficult to estimate with precision the difference between the cost of replacement and the new structure. The defendant arrives at the figure we think upon a logical basis. The material change in the new wall consisted in the use of longer piling on the two front rows of the structure, and piles of sufficient length in the remaining rows to develop a safe bearing capacity of from 12 to 15 tons. Drawings of the collapsed structure disclosed the number of piles per

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bent in the old wall, but not their length. It was assumed by the defendant that the piles in the old structure were 20 feet in length, and for the difference an allowance of $550 was deducted from the Regan Construction Company's price for doing the work. While we have said the basis of the computation adopted by the defendant seems logical and just, we are not inclined to adopt the figures given. The new structure was an improved wall, materially increased in strength and stability, capable of bearing an increased load, designed to meet modern usages, and erected in the light of 1928 conditions. Many changes were made in the construction contract as the work proceeded, and from the figures given in the record we think $1,550 would be a just allowance. The price paid to the Regan Construction Company for the new wall was $17,545, leaving the cost of replacement at $15,995, to which must be added the sum of $2,401.76, actual cost of replacing telephone and electric wires, etc., totaling $18,396.76, for which amount the defendant's counterclaim will be allowed. Judgment will be awarded the plaintiff for $12,102.37. It is so ordered.

WILLIAMS, *Judge*, and LITTLETON, *Judge*, did not hear and took no part in the decision of this case.

GREEN, *Judge*, and GRAHAM, *Judge*, concur.

HERBERT DU PUY v. THE UNITED STATES[1]

[No. E-209. Decided December 2, 1929]

On Plaintiff's Motion for New Trial

Settlement of taxes and penalties; provision against use of same as admission or evidence; protest.—See *Du Puy* v. *United States*, 67 C. Cls. 348.

The following opinion, supplemental to that of April 1, 1929, reported at 67 C. Cls. 348, was delivered by GREEN, *Judge*, December 2, 1929, on plaintiff's motion for new trial:

The brief of the plaintiff on motion for a new trial correctly states that the opinon herein was rendered upon a

[1] Certiorari denied.

question which was not discussed by counsel on either side. The plaintiff has therefore properly presented a brief and argument upon this question, and we think that under the circumstances an opinion should be rendered upon consideration of this argument.

The original opinion held that a paragraph near the close of the contract of settlement was repugnant to the body of the contract and if enforced would nullify the whole of the instrument. This paragraph is set out in the original opinion, but as it is the basis of this opinion also, we quote it again as follows:

"Neither this offer of compromise, nor any payment made or action taken thereunder, shall be used as an admission by, or offered in evidence against, Herbert Du Puy, Amy H. Du Puy, Morewood Realty Holding Company, Lansing Realty Holding Company, or Goodwin Sand & Gravel Company, or their successor or successors, or representatives, or any of them in any future action or proceeding of any nature whatsoever."

Counsel for plaintiff seem to concede in argument the correctness of the rule quoted from Bishop on Contracts, and stated in the original opinion as follows:

"If the main body of the writing is followed by a proviso wholly repugnant thereto, it must necessarily be rejected, because otherwise the entire contract will be rendered null; * * *."

It is now contended by counsel for plaintiff that the entire contract was not rendered null by this clause, and it is said in the brief of counsel that—

"The court is not ousted of jurisdiction to define the relative obligations between the parties."

This may be conceded. Both before and after the contract was signed, and whether it be held to be a nullity or not, this court has jurisdiction to define the relative obligations between the parties, and it has done so.

It is also said that—

"On the contrary, the parties have agreed to invest the court with jurisdiction to determine the legality of the taxes which, but for the presence of this clause, the court might be deemed foreclosed from determining."

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But this sort of reasoning would prevent the rule of law upon which the case was decided from ever applying in any case. The main body of the contract did indeed foreclose the court from passing on the legality of the taxes. The nullifying clause, if put in force and effect, prevented the contract from being used, offered in evidence, or considered by the court. In other words, the whole matter stood just as if the contract had never been executed. The paragraph in question did not invest the court with jurisdiction; it had that already. In fact it made no attempt to do so. If held valid, the result was to make the whole contract of no effect by preventing the court from considering it. As said in the original opinion, it would make the contract a mere scrap of paper as to which the court could only decide that it had no effect on the case or the legal relations of the parties.

It is also argued that the terms of the compromise did not include the taxes in question but only the penalties assessed against the plaintiff. This is directly contrary to the language used in the letter which set out the terms of the settlement. In this connection see also the case of *Ely & Walker Dry Goods Co.* v. *United States*, 34 Fed. (2d) 429 (a case in which a settlement was involved), holding that under the act of 1918, the penalty became part of the tax and together therewith constituted a single liability.

We think it quite clear that the paragraph in question nullified the main body of the contract and entirely destroyed its only purpose, which was to settle entirely the controversy over taxes between plaintiff and defendant. The motion for a new trial must therefore be overruled.

WILLIAMS, *Judge*, and LITTLETON, *Judge*, did not hear and took no part in the decision of this case.

GRAHAM, *Judge*, and BOOTH, *Chief Justice*, concur.

BERT E. NICKERSON v. THE UNITED STATES

[No. H-41. Decided December 2, 1929]

On the Proofs

Army pay; commutation of quarters; departure from permanent station to hospital.—(1) An officer of the Army who, having quarters at his permanent station for himself and wife, leaves under orders for treatment and observation at a distant hospital where no public quarters are available and is thereby compelled to rent quarters for his wife near the hospital, is entitled to rental allowance for the time public quarters are not available, notwithstanding the order sending him to the hospital did not specifically relieve him from duty at his permanent station during or at the termination of his absence, which, under War Department regulations, was required for the termination of assignment of quarters at a permanent station.

(2) Where the statute gives such an allowance to an officer for rental of quarters, the regulations may not take it away.

The Reporter's statement of the case:

Mr. George A. King for the plaintiff. *Mr. John W. Gaskins* and *King & King* were on the brief.

Mr. M. C. Masterson, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff, Bert E. Nickerson, during the time covered by this suit, was a major on active duty in the Philippine Scouts, United States Army.

II. On January 31, 1922, the plaintiff reported for duty at Fort William McKinley, Rizal, Philippine Islands, and on the same date was assigned to quarters at that place for the occupancy of himself and wife. While stationed at Fort William McKinley, the plaintiff had been for some time under observation and treatment in the Sternberg General Hospital at Manila and on September 23, 1922, he received the following order:

"14. Upon recommendation of the Medical Examining Board the following-named officers are transferred from

Sternberg General Hospital, Manila, to Letterman General Hospital, Presidio of San Francisco, California, and will proceed by first available transport to San Francisco, California, reporting upon arrival to the commanding officer of the latter hospital for further observation and treatment: Major Bert E. Nickerson, Philippine Scouts" (and three other officers).

III. The Executive order of August 13, 1924, issued pursuant to the act of May 31, 1924 (43 Stat. 250), provides:

"II. *Assignment of quarters.*—(a) The assignment of quarters to an officer shall consist of the designation in accordance with regulations of the department concerned of quarters controlled by the Government for occupancy without charge by the officer and his dependents, if any.

"(b) Every officer permanently stationed at a post, yard, or station where public quarters are available, will be assigned thereat as quarters the number of rooms prescribed by law for an officer of his rank, or a less number of rooms determined by competent superior authority, in accordance with the regulations of the department concerned, to be adequate in the particular case for the occupancy of the officer and his dependents, if any; which regulations shall provide among other things that quarters voluntarily occupied by an officer with his dependents shall be conclusively presumed to be adequate and shall be assigned accordingly. * * *."

The War Department regulations are contained in circular 66 of October 17, 1924, and paragraphs 2 (a) and (3) are in part as follows:

"2. *Termination of assignments.*—(a) An officer's assignment of quarters at his permanent station shall be terminated by the officer chargeable with making assignments of quarters thereat under the following conditions, and, except as provided in paragraph 3c below, under no other conditions, unless upon specific order of The Adjutant General:

"(3) On his departure from the permanent station on field or sea duty, on temporary duty, to hospital for observation or treatment, on leave of absence or on sick leave, under orders which relieve him from duty at his permanent station during or at the termination of his absence, unless the officer files request to the contrary.

"(4) When orders are received for an officer absent from his permanent station on field or sea duty, on temporary duty, in hospital, on leave of absence, or on sick leave, relieving him from duty at his permanent station, during

or at the termination of his absence, unless the officer, or his authorized agent, files request to the contrary.

"3. *Adequacy of quarters.*—(a) In determining the adequacy of quarters, the officer charged with making assignment of quarters, who is competent superior authority for that purpose, will give due consideration to the rank of the officer and to the number, age, and sex of dependents, if any.

"(b) Any quarters at his permanent station voluntarily accepted and occupied by an officer who has no dependents or by an officer with his dependents shall be conclusively presumed to be adequate.

"(c) Any quarters at the permanent station of the officers involved voluntarily occupied jointly by two or more officers having no dependents; * * * shall be conclusively presumed to be adequate for the occupancy of such officers or of such officers and their dependents. If the quarters so jointly occupied were previously assigned to one of the officers, the assignment to the one officer will be terminated and a joint assignment made. A joint assignment of quarters shall be terminated in so far as any particular officer is concerned when that officer (with his dependents, if any) ceases to participate in the joint occupancy of such quarters."

IV. Plaintiff reported for duty at Fort William McKinley, Rizal, P. I., on January 31, 1922, and was assigned to quarters No. 76, effective the same date. On February 2, 1922, he was assigned to quarters No. 28, effective February 1, 1922. On March 22, 1922, plaintiff requested to be assigned to quarters No. 27 jointly with a captain who was occupying the quarters at that time. He was assigned to said quarters No. 27, effective April 17, 1922, and occupied these jointly with the captain until May 31, 1922. On or about June 1, 1922, the captain was relieved from joint assignment with plaintiff and a major was assigned to quarters No. 27 jointly with plaintiff. Plaintiff continued to occupy quarters No. 27 jointly with this officer until October 12, 1922, the date of his departure from Fort William McKinley.

V. On September 23, 1922, the plaintiff received the following order (Special Orders No. 22):

"14. Upon recommendation of the Medical Examining Board the following-named officers are transferred from

Sternberg General Hospital, Manila, to Letterman General Hospital, Presidio of San Francisco, California, and will proceed by first available transport to San Francisco, California, reporting upon arrival to the commanding officer of the latter hospital for further observation and treatment: Major Bert E. Nickerson, Philippine Scouts" (and three other officers).

VI. On October 11, 1922, the plaintiff and his wife vacated their quarters at Fort William McKinley, and the post commander at that place forwarded the following communication to the finance officer at Fort Mason, Presidio of San Francisco, California:

HEADQUARTERS FORT WILLIAM MCKINLEY,
Rizal, P. I., October 11, 1922.

Subject: Vacation of Quarters.
To: Finance Officer, 9th Corps Area, Fort Mason, California.

1. Major Bert E. Nickerson, 45th Infantry (P. I.), and his dependents vacated his quarters at this station October 12, 1922, when he left for the United States in compliance with paragraph 14, Special Orders 222, Headquarters Philippine Department, September —, 1922, transferred sick from Sternberg General Hospital, Manila, P. I., to Letterman General Hospital, San Francisco, California.

For the post commander:

JOHN A. STERLING,
Assistant Adjutant.

On October 12, 1922, the plaintiff and his wife sailed from Manila for San Francisco on the U. S. Army transport *Logan* pursuant to the order received by the plaintiff dated September 23, 1922. Government transportation was furnished the plaintiff from Manila to San Francisco on the Army transport as shown by the following:

HEADQUARTERS PHILIPPINE DEPARTMENT,
OFFICE OF THE QUARTERMASTER,
Manila, P. I., Sept. 30, 1922.

Subject: Transportation.
To: Major Bert E. Nickerson, P. S., Ft. McKinley, P. I.

1. First-class transportation will be furnished on the U. S. Army transport *Logan* sailing from this port at 12.00 noon, Oct. 12, for yourself to San Francisco.

* * * * * * *

By the order of the Quartermaster.

M. D. WHEELER.

VII. On arrival in the United States plaintiff officer entered Letterman General Hospital, Presidio of San Francisco, California. He remained there until he was retired in pursuance of the following orders:

SPECIAL ORDERS No. 99. WAR DEPARTMENT, *Washington, April 27, 1923.*

39. By direction of the President, Major Bert E. Nickerson, Philippine Scouts, now at the Letterman General Hospital, San Francisco, California, will report in person to Colonel Thomas A. Pearce, Infantry, president of an Army retiring board at headquarters Ninth Corps Area, San Francisco, California, at such time as he may designate for examination by the board. Upon completion of his examination Major Nickerson will return to the place of receipt by him of this order.

BY ORDER OF THE SECRETARY OF WAR:

JOHN J. PERSHING,
General of the Armies, Chief of Staff.

SPECIAL ORDERS No. 208. WAR DEPARTMENT, *Washington, September 11, 1923.*

20. Major Bert E. Nickerson, Philippine Scouts, having been found by an Army retiring board incapacitated for active service on account of disability incident thereto, and such finding having been approved by the President, the retirement of Major Nickerson from active service, under the provisions of section 1251, Revised Statutes, is announced. He will proceed to his home. The travel directed is necessary in the military service and is chargeable to procurement authority FD 26 P 5040 A 2-4.

BY ORDER OF THE SECRETARY OF WAR:

JOHN J. PERSHING,
General of the Armies, Chief of Staff.

VIII. The plaintiff made application for quarters for himself and wife on arrival at the Presidio of San Francisco, but was informed no quarters were available for them. During the time the plaintiff was in the Letterman General Hospital, Presidio of San Francisco, his wife occupied quarters rented by the plaintiff.

IX. A recent reply to a call on the War Department is that the "records indicate quarters Number 27 assigned to Major Carl H. Seals, 45th Infantry, effective November 21, 1922, or as soon thereafter as practicable. Records silent

as to disposition of quarters in question between dates of October 12th and November 21, 1922."

X. If plaintiff is entitled to recover rental allowance for the period between October 12, 1922, and September 11, 1923, eleven months at $120 per month, the amount would be $1,320.

The court decided that plaintiff was entitled to recover.

BOOTH, *Chief Justice*, delivered the opinion of the court:

The plaintiff, a major in the Army, reported for duty at Fort William McKinley, Rizal, Philippine Islands, and on January 31, 1922, was assigned quarters there for himself and wife. The plaintiff's health was not good, and after his detail to the Philippines was under observation and treatment in the Sternberg General Hospital at Manila. On September 23, 1922, less than a year after his arrival at Fort McKinley, the plaintiff received an order transferring him from the Sternberg General Hospital in Manila to the Letterman General Hospital, Presidio of San Francisco, California, for further observation and treatment. On October 11, 1922, the plaintiff, accompanied by his wife, sailed from Manila for San Francisco. Their departure vacated the quarters they had previously occupied—an obvious fact—and the post commander so certified to the finance officer at Fort Mason, San Francisco. When the plaintiff and his wife arrived in San Francisco the plaintiff entered the Letterman Hospital, and there being no available quarters for himself or wife at the fort, the plaintiff rented and paid for suitable rooms for his wife in a private residence. The plaintiff's health continued precarious, the result being that in pursuance of a finding of an Army retiring board, he was on September 11, 1923, by proper order retired from the Army on account of disability incurred in line of duty. The present suit is for the recovery of rental allowance alleged to be due an officer with a dependent wife, and is founded upon the following statutes and Army regulations, viz, the act of June 10, 1922 (42 Stat. 625, 628):

"The rental allowance shall accrue while the officer is on field or sea duty, temporary duty away from his permanent

station, in hospital, on leave of absence or on sick leave, regardless of any shelter that may be furnished him for his personal use, if his dependent or dependents are not occupying public quarters during such period."

the act of May 31, 1924 (43 Stat. 250), amending the act of June 10, 1922, *supra*, and reading as follows:

"No rental allowance shall accrue to an officer, having no dependents, while he is on field or sea duty, nor while an officer with or without dependents is assigned as quarters at his permanent station the number of rooms provided by law for an officer of his rank or a less number of rooms in any particular case wherein, in the judgment of competent superior authority of the service concerned, a less number of rooms would be adequate for the occupancy of the officer and his dependents."

The Executive order of August 13, 1924, following the act of May 31, 1924, provides as follows:

"II. *Assignment of quarters.*—(*a*) The assignment of quarters to an officer shall consist of the designation in accordance with regulations of the department concerned of quarters controlled by the Government for occupancy without charge by the officer and his dependents, if any.

"(*b*) Every officer permanently stationed at a post, yard, or station where public quarters are available, will be assigned thereat as quarters the number of rooms prescribed by law for an officer of his rank, or a less number of rooms determined by competent superior authority, in accordance with the regulations of the department concerned, to be adequate in the particular case for the occupancy of the officer and his dependents, if any; which regulations shall provide among other things that quarters voluntarily occupied by an officer with his dependents shall be conclusively presumed to be adequate and shall be assigned accordingly. * * *"

The pertinent War Department regulations are contained in circular 66, dated October 17, 1924, and provide as follows:

"*Termination of assignments.*—*a.* An officer's assignment of quarters at his permanent station shall be terminated by the officer chargeable with making assignments of quarters thereat under the following conditions, and, except as provided in paragraph 3*c* below, under no other conditions, unless upon specific order of The Adjutant General:

"(1) When the post, camp, or station ceases to be the permanent station of the officer concerned.

"(2) When the quarters assigned to him are required for assignment to an officer superior in rank.

"(3) On his departure from his permanent station on field or sea duty, on temporary duty, to hospital for observation or treatment, on leave of absence or on sick leave, under orders which relieve him from duty at his permanent station during or at the termination of his absence, unless the officer files request to the contrary.

"(4) When orders are received for an officer absent from his permanent station on field or sea duty, on temporary duty in hospital, on leave of absence, or on sick leave, relieving him from duty at his permanent station, during or at the termination of his absence, unless the officer, or his authorized agent files request to the contrary.

"(5) At the discretion of the commanding officer when an officer requests assignment of quarters that have been vacated or have otherwise become available subsequent to the assignment to him of his present quarters."

The Comptroller General refused to allow the claim, resting a decision to that effect upon the fact that authority did not obtain to terminate the plaintiff's assignment of quarters because the order sending him to the San Francisco hospital did not specifically recite that he was relieved from duty at his permanent station during or at the termination of his absence. The case of *Lt. Harry A. Sanford*, 6 Comp. Gen. 400, is cited.

The statute gives the allowance and manifestly regulations may not take it away. The acts of June 10, 1922, and May 31, 1924, accrue the allowance to an officer on "duty away from his permanent station, in hospital * * * if his dependent or dependents are not carrying public quarters during such period." The plaintiff's situation falls precisely within the terms of the statutes, and likewise meets all the requirements of the regulations, except the positive statement relieving the plaintiff from duty at his permanent station. The plaintiff was ill and had been for some time. His illness transferred him from active duty to the hospital; no statement is made to the contrary. His physical condition continued precarious and finally in the judgment of those qualified to pass thereon, he received positive orders that transferred him from the Philippines to San Francisco, a

Syllabus

journey across the Pacific, thousands of miles away from his last detail. Regulations may not meet every contingency; situations may develop where the effect of what takes place operates to bring the event within the regulations, though not positively expressed in the orders bringing it about. Surely an officer suffering from physical disabilities which rendered it essential to transfer him from one section of the world to another may not, as a matter of fact, be regarded as still on active duty at the former station, especially so when he is in a hospital under treatment and observation. To hold otherwise would impose upon the afflicted plaintiff the duty of coming to San Francisco and allowing his wife to remain in the Philippines alone, unable to be near him in his illness. The statute did not so intend. In addition, the quarters were vacated. The Government utilized them by another assignment, and because of the plaintiff's physical disabilities he never thereafter returned to occupy them. The *Sanford case* at the most is not this case. In the *Sanford case* the officer returned to his permanent station following each absence in the hospital, and performed active duty. This plaintiff was honorably discharged.

The plaintiff is entitled to judgment for $1,320.00. It is so ordered.

WILLIAMS, *Judge*, and LITTLETON, *Judge*, did not hear and took no part in the decision of this case.

GREEN, *Judge*, and GRAHAM, *Judge*, concur.

IOWA TRIBE OF INDIANS v. THE UNITED STATES

[No. 34677. Decided May 6, 1929. New Judgment December 2, 1929]

On the Proofs

Special jurisdictional act of April 28, 1920, as amended January 11, 1929; scope.—Under the special jurisdictional act of April 28, 1920, as amended January 11, 1929, the Court of Claims has jurisdiction to inquire into and adjudicate reciprocal rights growing out of oral as well as written contracts entered into between the Iowa Tribe of Indians and the United States, and

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in addition to determine and adjudicate the issue as to whether there has been a failure upon the part of the United States to pay any money which may be legally or equitably due the Indians.

Same; authority to grant relief.—Under the aforesaid act the Court of Claims is authorized to grant relief where the facts show an unconscionable bargain between the parties, and that the written contract was procured by representations and promises that were not observed.

Same; actual agreement; lack of tribal government; report of commission.—(1) The report of the commission authorized by section 14 of the act of March 2, 1889, did not reflect the actual agreement entered into between the Iowa Indians and the United States.

(2) To such an agreement in the absence of a tribal government, the assent of the individual Indians was necessary.

Same; misrepresentation; equitable relief.—Where in negotiations between ignorant and illiterate members of an Indian tribe and the United States it appears that the Indians had "fixed minds" upon certain propositions, and were dissuaded therefrom by arguments based upon misconceptions of their rights, the case is one that calls for equitable relief.

The Reporter's statement of the case:

Messrs. Roy Hoffman and *Charles S. Thomas* for the plaintiff. *Messrs. Charles J. Kappler, John H. Miley,* and *Frank B. Burford* were on the briefs.

Mr. George T. Stormont, with whom was *Mr. Assistant Attorney General Herman J. Galloway,* for the defendant.

This case was originally decided May 6, 1929. On December 2, 1929, the judgment was vacated and a new judgment entered with amended special findings, the opinion and former findings as amended to stand. The special findings of fact as amended and the opinion are as follows:

I. This action was begun by a petition filed August 13, 1920, and amended petition filed February 17, 1925, under the authority of the act of Congress approved April 28, 1920, amended January 11, 1929, providing as follows:

"That jurisdiction is hereby conferred upon the Court of Claims to hear, determine, and render judgment on principles of justice and equity and as upon a full and fair arbitration of the claims of the Iowa Tribe of Indians, of

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Oklahoma, against the United States, with the right of appeal by either party to the Supreme Court of the United States, for the determination of the amount, if any, which may be legally or equitably due said tribe of Indians under any treaties or laws of Congress or under any stipulations or agreements, whether written or oral, entered into between said tribe of Indians and the United States or its authorized representatives, or for the failure of the United States to pay any money which may be legally or equitably due said tribe of Indians: *Provided*, That the court shall also consider and determine any legal or equitable defenses, set-offs, or counterclaims which the United States may have against the said Iowa Tribe of Indians. A petition in behalf of said Indians shall be filed in the Court of Claims within one year after the passage of this act, and the Iowa Tribe of Indians shall be the party plaintiff and the United States the party defendant, and the petition may be verified by the attorney employed by the said Iowa Tribe of Indians to prosecute their claim under this act, under contract to be approved by the Commissioner of Indian Affairs and the Secretary of the Interior, as provided by law, upon information and belief as to the facts alleged in said petition. Upon the final determination of the cause, the Court of Claims shall decree such fees and expenses as the court shall find to be reasonably due to be paid to the attorney or attorneys employed by said Iowa Tribe of Indians, and the same shall be paid out of any sum or sums of money found due said Iowa Tribe of Indians: *Provided*, That in no case shall the fees and expenses decreed by said court be in excess of 10 per centum of the amount of the judgment."

"*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That jurisdiction be conferred upon the Court of Claims to hear, determine, adjudicate, and render judgment in the cause now pending in the Court of Claims, Docket Numbered 34677, entitled 'The Iowa Tribe of Indians versus the United States of America,' referred to said court by the act of Congress approved April 28, 1920 (Forty-first Statutes at Large, page 585), in the claim of the Iowa Tribe set forth in paragraph 6 of the amended petition filed in said court February 17, 1925, regardless of the limitation as to time for filing claims made in said act approved April 28, 1920.

"Approved January 11, 1929."

II. The reservation occupied by the plaintiffs in the Territory of Oklahoma was set apart for their permanent use

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and occupation by Executive order of the President of the United States, dated August 15, 1883, providing as follows:

"It is hereby ordered that the following-described tract of country in the Indian Territory, viz: Commencing at the point where the Deep Fork of the Canadian River intersects the west boundary of the Sac and Fox Reservation; thence north along the said west boundary to the south bank of the Cimarron River; thence up said Cimarron River to the Indian Meridian; thence south along said Indian Meridian to the Deep Fork of the Canadian River; thence down said Deep Fork to the place of beginning, be, and the same hereby is, set apart for the permanent use and occupation of the Iowa and such other Indians as the Secretary of the Interior may see fit to locate thereon."

III. The Iowa Tribe of Indians had previously removed from their former treaty reservation in the States of Nebraska and Kansas to, and occupied in common, the lands so set apart by said Executive order for its permanent use and occupation in the Indian Territory, now the State of Oklahoma, and were in occupation of said lands from August 15, 1883, up to and including May 20, 1890.

IV. Under date of May 17, 1890, the Jerome or Cherokee Commission representing the United States, entered into negotiations with the said Iowa Tribe in Oklahoma for the taking of allotments in severalty by the members of the tribe, and the sale to the United States of the surplus land in the reservation, remaining after the allotment, all in compliance with the instructions of the Department of Interior to negotiate with the various Indian tribes, including the plaintiffs, for the cession to the United States of all of their title, claim, or interests in lands in the Indian Territory lying west of 96° of longitude, in pursuance of section 14 of the act of Congress approved March 2, 1889.

V. The claim arises out of proceedings had in connection with the agreement with the Iowa Tribe of Indians of May 20, 1890, ratified by act of Congress approved February 13, 1891 (26 Stat. 753). Articles of said agreement, so far as material to be stated, follow:

"ARTICLE I

"The said Iowa Tribe of Indians, residing and having their homes thereon, upon the conditions hereafter expressed,

do hereby surrender and relinquish to the United States all their right, title, claim, and interest in and to and over the following described tract of country in the Indian Territory, namely:

"'Beginning at the point where the Deep Fork of the Canadian River intersects the west boundary of the Sac and Fox Reservation; thence north along said west boundary to the south bank of the Cimarron River; thence up said Cimarron River to the Indian meridian; thence south along said Indian meridian to the Deep Fork of the Canadian River; thence down said Deep Fork to the place of beginning,' set apart for the permanent use and occupation of the Iowa and such other Indians as the Secretary of the Interior may see fit to locate thereon, by Executive order made and dated the fifteenth day of August, in the year of our Lord eighteen hundred and eighty-three.

"ARTICLE II

"Each and every member of said Iowa Tribe of Indians shall be entitled to select and locate upon said reservation or tract of country eighty acres of land which shall be allotted to such Indian in severalty. No other restriction as to locality shall be placed upon such selections than that they shall be so located as to conform to the congressional survey or subdivision of said tract of country, and any Indian having improvements may have the preference over any other Indian in and to the tract of land containing such improvements so far as they are within a legal subdivision not exceeding in area the quantity of land that he is entitled to select and locate. * * *

"ARTICLE V

"There shall be excepted from the operation of this agreement a tract of land, not exceeding ten acres in a square form, including the church and schoolhouse and graveyard at or near the Iowa Village, and ten acres of land shall belong to said Iowa Tribe of Indians in common so long as they shall use the same for religious, educational, and burial purposes for their said tribe, but whenever they shall cease to use the same for such purposes for their tribe, said tract of land shall belong to the United States.

"ARTICLE VI

"When all the allotments are made as aforesaid the United States, under the direction of the Commissioner of

Indian Affairs, will expend for said Iowa Tribe of Indians described herein as beneficiaries of this agreement for improving their said land, for building houses, providing for said Indians breeding animals, agricultural implements, and seeds, the sum of twenty-four thousand dollars: *Provided*, That said sum shall be paid out as nearly equally per capita as may be, the father, or, if he be dead, the mother, to act for their children under the age of eighteen years—and the Commissioner of Indian Affairs in his own discretion to act for orphan children under the age of eighteen years.

"ARTICLE VII

"As a further and only additional consideration for such surrender and relinquishment of title, claim, right, and interest, as aforesaid, the United States will pay to said Iowa Indians, the beneficiaries of this agreement, per capita, three thousand and six hundred dollars per annum, payable semiannually, for the first five years after this agreement shall take effect; three thousand dollars per annum payable semiannually, for the second five years after this agreement shall take effect; two thousand and four hundred dollars per annum, payable semiannually for the third five years after this agreement shall take effect; one thousand eight hundred dollars per annum, payable semiannually, for the fourth five years after this agreement shall take effect, and one thousand two hundred dollars per annum, payable semiannually for the fifth five years after the agreement shall take effect. * * *

"ARTICLE VIII

"It is hereby expressly agreed and understood that nothing herein contained shall in any manner affect any other claim not mentioned herein that said Iowa Tribe of Indians have against the United States; nor shall this agreement in any manner affect any interest that said tribe or its members may have in any reservation of land outside of the Indian Territory, nor shall this agreement in any manner affect any annuities or payments, principal or interest due, to said tribe or its members by existing laws or treaties with the United States.

"ARTICLE IX

"William Tohee, the chief of the Iowas, is incurably blind and helpless, and has a wife, Maggie Tohee, an Iowa woman, but by whom William has no child. William is not only helpless but requires and receives the constant care and at-

tention of Maggie, so that neither can give attention to matters of business or labor, or devote their time or energy to procuring a living. Therefore, it is mutually agreed in addition to the provisions hereinbefore made for the Iowas, including said William and Maggie, that the United States will pay out to or for the use of said William, under the direction of the Commissioner of Indian Affairs, the sum of three hundred and fifty dollars. Because of the relation between the said William and Maggie and the care that he requires of her, and that she bestows upon him, it is agreed that the patents to them creating the trust in the United States for them for the period of twenty-five years, shall further recite and provide that in event of the death of either said William or Maggie during said period of twenty-five years, then the possession and use of the lands allotted to both shall be in the survivor and patents for the land allotted to both shall issue to the survivor, discharged of the said trust at the expiration of the said twenty-five years, provided said parties shall be living together as man and wife until the death of either."

VI. Upon completion of the negotiations and the signing of the foregoing agreement of May 20, 1890, the commission submitted the following report and transmitted the agreement to the President:

"IOWA VILLAGE, *May 28th, 1890.*

"SIR: We have the honor now to make report to you in pursuance of the act of Congress authorizing the creation of what is commonly known as the Cherokee Commission. Under the instructions of the Hon. Secretary of the Interior, the commission met at Guthrie, Oklahoma, on the 12th inst.

"After securing transportation and making other necessary preparations for visiting the Indians at their home, we left Guthrie on the 16th and arrived at the Iowa Village on the 17th inst.

"After conferring with Chief Tohee and other members of the tribe a meeting was arranged for that afternoon, which was held. Some three hours were spent in discussing the wants of the Government in a general way by the commissioners, and the Indians in a like general way presented their objections to any change in their condition or circumstances.

"On Monday, the 19th, another conference was held and much talk was had, when the commission presented to them a definite proposition providing for allotments in severalty

of eighty (80) acres of land for each Iowa Indian residing upon the reservation and money payments as follows:

"Twenty-four thousand dollars to be paid out under the direction of the Commissioner of Indian Affairs, as nearly per capita as may be, in the improvement of their allotments, buying breeding animals, agricultural implements, and seeds; also thirty-six hundred dollars per annum, payable semi-annually, for the first five years after the contract shall take effect; three thousand dollars per annum, payable semi-annually, for the second five years after the contract shall take effect; twenty-four hundred dollars per annum, payable semiannually, for the third five years after the contract shall take effect; eighteen hundred dollars per annum, payable semiannually, for the fourth five years after the contract shall take effect; and twelve hundred dollars per annum, payable semiannually, for the fifth five years after the contract shall take effect.

"On Tuesday, the 20th, another council was held when three of the most advanced and intelligent members of the tribe accepted the offer and signed the contract.

"On the night of our arrival the Iowas held a grotesque dance to the music of a bass drum accompanied by sleigh bells.

"This exercise was said to be for the purpose of invoking aid from on high to guide them in their negotiations with the commissioners. The dancing was continued Sunday and parts of other days during our stay, but negotiations were pushed quietly from day to day until a successful result was reached.

"Before closing the contract, at the request of many Indians and at the dictation of humanity, an additional sum of three hundred and fifty dollars was provided for Chief Tohee because of his total blindness and complete helplessness.

"The Iowas are but little advanced in civilization and the older men are especially averse to adopting or even approaching the ways of the white man. They seem unwilling to have their children educated and seem afraid with the whites; therefore in the contract we have adopted the plan embraced in the general allotment act of Congress, that the United States shall hold title in trust in their lands for a period of twenty-five years. These Indians are poor, indeed.

"The most intelligent among them inform us that many have no regular meals or mealtime, but cook and eat whenever they have anything to cook and eat, whether it is twice in one day or once in two days. With a large reservation of much very good land a great majority of them could not

or would not live without annuities from the Government. They live in bark houses, admirably adapted to summer use while rains are not upon them. There seems to be now no incentive to energy; to exist is all that is required—a realization of the communist's dream—much property held in common, with greater poverty the common lot of all.

"The Iowas have no government that we are made aware of. They have a chief and he has some advisers of his own selection, but no one seems to have authority to control or direct. In conferences with the commission any Indian seemed to have as much to say and with as much authority as the chief.

"No person or set of persons assumed or claimed the right to make arrangements or contract with the Government by virtue of any position, official or otherwise, held by him or them. So that we were compelled to and did deal with the tribe. Of the chief and four advisers, we have secured the signatures of three to the contract, a majority of one. Of the twenty-three (23) male members of the tribe over eighteen years of age residing and being on the reservation we have secured the signatures of thirteen (13). Of less than fifty members of the tribe, male and female, over the age of eighteen years, we have secured the signatures of thirty-four. Of an entire population of about eighty-six, men, women, and children, we have secured the signature of those over eighteen years of age that represent sixty-two.

"Those that did not sign the contract, a small minority in any way considered, all united in saying the contract was good and fair and liberal, but they would not sign it simply because they did not want to.

"The Iowa Reservation contains two hundred and twenty-eight thousand four hundred and eighteen acres.

"The Iowa Tribe residing on said reservation is composed of eighty-six persons, as nearly as we can arrive at the number.

"The allotments and church and schoolhouse reservation contain (if eighty-six allotments shall prove correct) six thousand eight hundred and ninety acres.

"The residue, two hundred and twenty-one thousand five hundred and twenty-eight acres, becomes the land of the United States with all Indian titles, claims, and interests extinguished.

"The amount agreed to be paid for such relinquishment is in the aggregate eighty-four thousand three hundred and fifty dollars, or thirty-eight cents per acre. But sixty thousand dollars of the money to be paid is in annuities extending over the period of twenty-five years, the present worth

of which computing interest at five per cent per annum, is in round numbers thirty-seven thousand dollars, making the aggregate sixty-one thousand three hundred and fifty dollars, or less than twenty-eight cents per acre.

"The commission is aware of the very limited extent of the Iowas' real title and interest in and to said tract of country, but their claim is absolute ownership, they believing or assuming to believe, that an Executive order signed by the Great Father setting land apart for their permanent use and occupation, makes absolute title. The standard of intelligence among the Iowas makes it exceedingly difficult to make them understand that they have but a limited and qualified interest. Other negotiations in the Territory perfected and pending, and especially the Oklahoma purchase, have come to their knowledge, and their minds had become fixed upon allotments of one hundred and sixty acres to each member of the tribe and one dollar and a quarter an acre for the residue of the reservation; but the commission knowing their title to be limited and their tenure even insecure procured the contract herein described.

"The commission appreciates the outfit for camping, transportation, and escort, commanded by an efficient officer in the person of Lieutenant Crawford.

"Our thanks are also especially due to Capt. H. C. Cavanaugh, 13th Inft. U. S. A., for his uniform courtesy and prompt action in executing the order of the War Department to furnish the above.

At the instance of the chief and other Indians the commission made and signed two supplemental articles of small import to the contract.

"At the instance of the chief because of the necessities of the Iowas, the commission agreed to recommend in its report (although foreign to the purpose for which the commission was created) that their annuities provided for by existing laws shall be paid semiannually, instead of annually, as he represents is now the practice. In compliance with such agreement we make such recommendation.

"The commission is aware that the many conditions and times of payment provided for in the contract make it seem complicated, but in view of the condition of the Iowas, they are all, in the judgment of the commission, necessary for the best interest and comfort and prosperity of the Indian.

"A list of the signers to the contract and of the persons represented by them is hereto appended.

"We leave here to-day to visit and open negotiations with the Sac and Fox Indians.

"We have the honor to be,

"Very respectfully, your obedient servants,

"DAVID H. JEROME,
"A. M. WILSON,
"WARREN G. SAYRE,
"*Commissioners.*"

VII. The Iowa Indians, at the time of the making of the agreement of 1890, were with few exceptions full-blood Iowas, poor, ignorant, helpless, living in squalor, averse to adopting the way of the whites; none of them could read or write, and few, if any, at that time understood the English language; they had no tribal government; each member of the tribe had as much to say about affairs as any other.

The negotiations between the commission and the Iowa Indians were begun May 17, 1890, at the Iowa Village, and formal sessions or conferences were arranged and attended by the commission and various members of the Iowa Tribe, on May 19, 20, 26, and 27. The negotiations were conducted through the use of interpreters. Stenographic record was made of the proceedings.

In addition, the members of the commission, certain white residents, and individual members of the Iowa Tribe were constantly engaged in informal interviews and discussions during the intervals between the formal sessions relative to the terms of the proposed agreement.

The formal discussions were participated in by 13 chiefs of the Iowa Tribe, 3 of whom, Chief William Tohee, Jefferson White Cloud, and Kerwin Murray, were among those who signed the agreement as tendered by the commission. The remaining participants in the formal conferences refused to sign the same.

Twenty-six of the original signers of the agreement have since died. Six others of the same group, including Victor Dupee; Ellen White Cloud, widow of Jefferson White Cloud; Susan Squirrel, now Small, widow of Garrie Squirrel; Josie Dole, widow of Willie Dole; Charlie Tohee, son, and Emma Tohee, niece of William Tohee, deceased, as well as other members of the tribe, who did not sign the agreement, appear as witnesses in support of the claim.

VIII. The Iowa Reservation consisted of much very good land, and, taken as a whole, it was better than the land in the Sac and Fox Reservation to the east and fully as good as the land of the Kickapoos to the south. Previous to the year 1890, the tribe was extremely poor. Their reservation was large, but not sufficient to supply their full requirements. They had no regular supply of food, but some revenue was secured from the leasing of the pasture of their reservation for cattle grazing.

IX. The commission in the course of the formal sessions informed the Iowa Tribe that they had been sent by the President of the United States to negotiate with them with regard to the reservation; that the Government was of the opinion that the tribe did not own the land of the reservation and had no right to it, except for enough for each one to live upon; that Congress had full right to dispose of the same after designating such portion as should be retained by the individual members of the tribe for their individual ownership and home; that due to the increasing demands made upon the Government by white settlers for homestead lands, some change would have to be made; that the Government had made up its mind as to what each member of the tribe should have; that Congress had authorized the President to open up the reservation to the white settlers, but before doing so, the President desired that each member of the tribe should be provided with a sufficient amount of land to enable him to farm it and live like a white settler and provide for his family, and further he desired that they should have the first choice of the land to be allotted.

The terms of the proposed agreement were then read to them and full explanation made in answer to all questions and objections with regard to the payment of the annuities, the provisions for farm equipment, the security of the title, and the exemption of the property from taxes.

In urging the acceptance of the terms incorporated in the proposed agreement it was stated that, after the succeeding October, the cattlemen would not be permitted to return and pasture their cattle on the reservation and that they would not receive the rental previously secured from the cattlemen; it was pointed out that there was not sufficient

game on the reservation to supply the wants of the tribe, and that they would thus be left without any means to procure their supplies.

It was urged that, on the other hand, the annuities would offset the pasture rental, and with the farm equipment, the supplies, and with the aid of the Government, they could learn to farm their allocated acreage and become self-supporting before the expiration of the period of payments of annuities.

It was also stated that if the members of the Iowa Tribe refused to accept the terms of the proposed agreement, it was probable that in the near future some arbitrary order would be issued, under the authority of an act of Congress known as the Dawes Act, by the terms of which the members of the tribe would not be allowed to make their own selection of the allotted lands, that their holdings would be designated by the authorities; that they would receive smaller acreunits than those offered by the commission, and that no annuities would be paid.

The Iowa Tribe were further told that the commission was also required to visit 25 or 30 other tribes in the territory; that the time permitted to the commission for the negotiations was short; that they would stay in the Iowa Village a reasonable time to receive their answer in regard to the proposed agreement, but that if the Iowa Tribe refused to sign the agreement, the commission would go away and not come back.

On the third day of the formal conferences the commission stated that, on account of the blindness of Chief William Tohee, special provision would be made in the agreement for his support. At the succeeding session of the formal conference Chief Tohee and "various persons," members of the tribe over 18 years of age, signed the agreement.

The signing of the agreement was subsequently completed, in part during the formal sessions and in part by individual solicitations day and night outside of the formal sessions.

X. The Indians in reply to the representations made by the commission in the formal sessions objected, in the first instance, to the statement that the land in question did not belong to them, but belonged to the Government, and it was

pointed out that a paper had been given to them to such effect. It was also objected that the tribe could not then act upon the proposed agreement, because of the absence of several members of the tribe who were in Nebraska and should have time to return to the reservation and be permitted to hear the proposals and explanation of the commission and determine whether they desired to participate. Some question was raised as to the authority of the commission to act on behalf of the Government. Others referred to previous treaties made by their forefathers, in which Indian lands had been surrendered to the Government, and in connection with which it was contended that the Government had not complied with the terms of such treaties.

Chief Tohee was unassured with relation to the provision for the release of the allotted property from taxes, stating that he had no great doubt that another administration would come along and change the law in this regard. Others, while admitting that the proposals made seemed to be desirable, nevertheless, expressed their fear that, when the Government changed in four years, the new administration would very possibly not carry out the full terms of the agreement and continue the payment of the annuities. Many of the older chiefs stated that they could not adopt the ways of the white man and could not work as they did. Others were obviously bewildered and unable to reach a determination at that time upon the merits of the proposed offer. Others still stated that they did not understand anything about the measuring of ground and had no idea of the size of property to be incorporated in the allotment; that they were not educated and could not write down the terms of the offer, or note the proposals which they themselves should insist upon; that they had to rely upon their own recollection of the statements made by the commission, and thus needed time for reflection and to correct any mistakes, or insert provisions not otherwise incorporated; they seriously objected to the insistence of the commission for haste in the matter, contending that such an important transaction as was proposed might require four or five years before it could be consummated.

It was repeatedly stated by the chiefs, participating in the formal discussion, that they were vitally interested in the welfare of their children, did not want to act in haste and make a mistake, but would want each child to get "a home big enough for a white man to live on." The commission was also many times reminded that the Iowa Tribe were not the first tribe in the Territory, that other tribes were there before they and that the commission should go to the first settlers first, namely, the Pottawatomies, the Sac, the Fox, and Kickapoos, and negotiate with them for the disposition of their lands, and that the Iowas would wait and see what terms were agreed to.

After the signing of the agreement by Chief William Tohee, he requested that the commission ask the President, on his behalf, for an extension of five years in the payment of annuities. Jefferson White Cloud, after making known his determination to sign the agreement, stated that he would like to have 160 acres for each of his family, and to have a well dug " on each quarter," and expressed the fear that if he declined to accept the agreement he would lose everything.

XI. In the course of the informal discussions, referred to above, the Indians insisted that if they had to give up their rights to the entire reservation they must receive in return allotments of 160 acres each and payment of $1.25 for each surplus acre ceded to the Government. They were told in reply that no better provision could be made in the written agreement than the terms set forth therein and were given assurance that the Iowa Tribe would not suffer by comparison with the other tribes to be visited by the commission, as regards the allotment and the amount to be paid for the surplus lands. There was no attempt in its bargain to deceive or mislead the Iowa Indians in these discussions, but the idea conveyed to them was that they would in the end receive, relatively speaking, the same terms as were given to the Sac, the Fox and Kickapoos, etc.; that the commission was very desirous of securing the signatures to the proposed agreements, so as to permit them to negotiate successfully similar treaties with the other tribes, and it was added that the action of the Iowas would not be forgotten.

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No provision was made and no method was discussed whereby the Iowas should secure the extra compensation contended for in the event a different basis of treatment was given the other tribes, and it was not regarded as necessary by the Indians. The verbal assurance having been given by Government officials was deemed to be sufficient and binding on the Government.

XII. The provisions of the agreement were based upon the assumption that the total area of the reservation equaled a total of 228,418 acres; that the allotments to be made would approximate 86 in number, requiring approximately 6,890 acres, inclusive of the reservation for school and cemetery purposes; and that the remainder to be ceded to the United States would equal 221,528 acres. The amount agreed to be paid for the relinquishment of the latter area was in the aggregate $84,350, or 38 cents per acre. Of this agreed amount of $84,350, the Iowa Tribe of Indians has received a total of $83,719.00, leaving a balance due of $631.00.

After the agreement had been concluded a survey of the reservation was had. A computation of the total acreage within the area described in Article I of the agreement of May 20, 1890, shows that the entire area, as shown by the plats of the surveys, embraced 279,296.57 acres. There were 108 allotments made to members of the Iowa Tribe, which equaled 8,605.30 acres; 10 acres were reserved for school and cemetery purposes. The total acreage opened to entry under Presidential Proclamation of September 18, 1891 (27 Stat. 989), issued in accordance with section 7 of the act of February 13, 1891 (26 Stat. 759), was 270,681.27 acres.

The difference between the total acreage as contemplated by the Jerome Commission in the negotiation of the agreement of May 20, 1890, and that shown by the official survey was 50,878.57 acres.

The difference between the sum paid to the Iowa Tribe of Indians ($83,719.00) for the cession of the 219,802.70 acres assumed to be surplus and the total valuation of the same acreage at $1.25 per acre, is $191,034.38.

The value of the 50,878.57 surplus acres, above referred to, at $1.25 per acre, is $63,598.21.

XIII. The Government subsequently paid the Sac and Fox Indians the sum of $1.25 per acre, the Pawnee, $1.25 per acre, and the Kickapoos the sum of 37 cents an acre, which subsequently, in connection with other claims by act of Congress, approved April 30, 1908 (35 Stat. 89), based on Senate Report No. 2561, Fifty-ninth Congress, first session, and Senate Report No. 5689, Fifty-ninth Congress, second session, was increased to $1.25 per acre; the United States sold the Iowa lands to settlers at $1.25 per acre as provided by section 7 of the act of Congress approved February 13, 1891 (26 Stat. 759).

XIV. Full compliance has been had with the provisions of Articles VI and VII of the agreement of May 20, 1890.

XV. The plaintiffs have withdrawn all claim with relation to the allegations contained in Paragraphs III and IV of the amended petition and Paragraph II, except with relation to the claim for the value of the bonds purchased by the United States Government for the Iowa Tribe.

XVI. In pursuance of the authority granted in articles 2 and 5 of the treaty between the United States and the Iowa Tribe of Indians of May 17, 1854 (10 Stat. 1069), the United States, out of the funds arising from the sale of lands provided for in article 3 of the said treaty, invested certain amounts in Federal and State interest-bearing bonds, a statement of that portion of the investment material to this case being as follows:

On January 9, 1858, Missouri State bonds of the par value of $15,000 were purchased at a cost of $10,500.

On the same date bonds of the State of North Carolina of the par value of $42,000 were purchased at a cost of $38,535.

On February 20, 1858, bonds of the State of Tennessee of the par value of $20,000 were purchased at a cost of $17,700.

The total par value of these bonds, all of which bore interest at the rate of 6% per annum, was $77,000, and the total cost was $66,735.

Interest on these bonds up to January 1, 1861, was collected and credited to the Iowa funds in the Treasury of the United States.

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Sometime during the year 1860 these bonds, together with others, were stolen by one Godard Bailey, a clerk in the office of the Secretary of the Interior, who was in charge of the "Indian trust fund."

By the act of Congress approved July 12, 1862, provision was made for the reimbursement of the plaintiff's loss.

In accordance with the terms of this act the sum of $66,735 was credited to the Iowas on the books of the Treasury, and thereafter interest on this amount as provided in the act was credited to them semiannually up to and including the year 1880. On April 1, 1881, in accordance with the provisions of the act of April 1, 1880, 21 Stat. 70, this sum was deposited in the Treasury of the United States to the credit of the "Iowa fund," which fund bore interest at the rate of 5 per cent per annum.

The sum of $5,032.23, being interest on the sums invested in the stolen bonds "from the date of the last payment of interest on said bonds to the 1st day of July, 1862," in accordance with the provisions of section 4 of the said act of July 12, 1862, was credited to the Iowa Indians on September 11, 1862.

The assent of the Iowa Indians to the provisions of the said act, as required by the provisions of section 5 thereof, was filed with the Secretary of the Interior at some date prior to November 25, 1862.

The court decided that plaintiffs were entitled to recover, in part.

BOOTH, *Chief Justice*, delivered the opinion of the court:

This case is before the court under the terms of the following special jurisdictional act (41 Stat. 585):

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That jurisdiction is hereby conferred upon the Court of Claims to hear, determine, and render judgment on principles of justice and equity and as upon a full and fair arbitration of the claims of the Iowa Tribe of Indians, of Oklahoma, against the United States, with the right of appeal by either party to the Supreme Court of the United States, for the determination of the amount, if any, which may be

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legally or equitably due said tribe of Indians under any treaties or laws of Congress or under any stipulations or agreements, whether written or oral, entered into between said tribe of Indians and the United States or its authorized representatives, or for the failure of the United States to pay any money which may be legally or equitably due said tribe of Indians: *Provided*, That the court shall also consider and determine any legal or equitable defenses, set-offs, or counterclaims which the United States may have against the said Iowa Tribe of Indians. A petition in behalf of said Indians shall be filed in the Court of Claims within one year after the passage of this act, and the Iowa Tribe of Indians shall be the party plaintiff and the United States the party defendant, and the petition may be verified by the attorney employed by the said Iowa Tribe of Indians to prosecute their claim under this act, under contract to be approved by the Commissioner of Indian Affairs and the Secretary of the Interior, as provided by law, upon information and belief as to the facts alleged in said petition. Upon the final determination of the cause the Court of Claims shall decree such fees and expenses as the court shall find to be reasonably due to be paid to the attorney or attorneys employed by said Iowa Tribe of Indians, and the same shall be paid out of any sum or sums of money found due said Iowa Tribe of Indians: *Provided*, That in no case shall the fees and expenses decreed by said court be in excess of 10 per centum of the amount of the judgment."

The petition filed upon behalf of the Iowa Indians alleges a number of causes of action, finally in the briefs and contentions of counsel reduced to three, the report of the Comptroller General disclosing a complete defense to all the items insisted upon except the three mentioned.

The Iowa Indians occupied, under an Executive order of the President dated August 15, 1883, a specifically described reservation in the then Territory of Oklahoma. The tribe had emigrated from Nebraska and Kansas and the reservation in Oklahoma was occupied in common. On May 20, 1890, the Jerome or Cherokee Commission, acting under the authority conferred by section 14 of the act of March 2, 1889, entered upon negotiations with the Indians, the purpose being to allot the tribal lands in severalty among the Indians and procure the surplus for the Government. The commission went upon the reservation and established personal contact with the Indians, and finally con-

summated an agreement wherein it was provided that each member of the tribe was to receive eighty acres of land in severalty, with no undue restrictions as to location. A stipulated reservation of acreage was made for religious and educational purposes, and especial provision was made for William Tohee, the chief of the tribe, because of his physical afflictions, being blind and enfeebled. The Government was to appropriate and expend $24,000.00 for agricultural machinery, horses, etc., etc., and pay for a period of twenty-five years certain agreed-upon annuities to be distributed per capita, diminishing in amount each five-year period. Briefly, the above covered the important provisions of the written agreement, with respect to which there is no controversy. The contention of the Indians, upon which this case is predicated, is that an oral agreement consummated before and as the inducing cause for signing the agreement of 1890, existed between the Indians and the commission, by the terms of which the commission agreed to thereafter increase the consideration for the cession of 1890 if similar agreements with neighboring Indians provided for a greater sum. It is conceded that the cession of 1890 was obtained for an average acreage price of 38 cents, and that 219,803 acres of surplus lands were obtained at this price. The difference between 38 cents and $1.25 per acre amounts to $193,253.00.

It was supposed by the commission and the Indians that the Iowa reservation contained a total of 219,803 acres of surplus lands; later an accurate survey increased the total acreage of 50,878 acres. The Government received from settlers $1.25 an acre for this acreage and the plaintiffs seek to recover the same; i. e., a total of $63,597.00.

The jurisdictional act contains certain provisions which we wish to emphasize by way of italics, viz: "*for the determination of the amount, if any, which may be legally or equitably due said tribe* * * * *under any stipulations or agreements, whether written or oral*, * * * *or for the failure of the United States to pay any money which may be legally or equitably due said tribe of Indians*." The act as a whole clearly evinces a congressional intent to refer to this court the rights of the Indians growing out of the transaction

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wherein the Indians ceded their lands to the Government and the Government assumed obligations to pay therefor. Congress, by the legislation, does not, of course, concede a liability; that is for this court to determine upon principles of law and equity. *United States* v. *Mille Lac Indians*, 229 U. S. 498. The subject matter of the suit is set forth in the act, and if the court finds that a legal or equitable obligation, which has not been fulfilled, results from the proceedings involved, judgment for the Indians necessarily follows. We say this not because of doubt as to the extent of the court's jurisdiction in the premises, for precedents are too numerous to cite sustaining the rule, but because at the outset the defendant challenges the right to consider the establishment of, or any liability under an oral agreement with the Indians. Defendant's contention is rested upon a lack of authority upon the part of the commissioners to bind the Government by an oral agreement. There are no express provisions in the act of 1889 which directly prohibited an oral agreement. The lack of authority to enter into one is deduced from the directions to report any and all agreements consummated, as well as minutes of the proceedings to the President, to be by him transmitted to Congress for ratification. The instructions given the commission by the Indian Office are to the same effect. While authority to act is of vital importance, failure to report what actually transpired carries with it equal obligations. Surely it may not be said that the omission of the commissioners to report an oral agreement to the President, and do what the act authorized and instructed them to do, concludes the rights of the Indians, if as a matter of fact a written and oral agreement were made. Congress did not circumscribe the authority of the commission to written agreements; all that was exacted was a detailed report of what was done. Naturally it would, in ordinary dealings between persons fully competent to contract, and standing upon an equal footing, be supposed that the terms of transfer of a vast acreage of valuable land would be evidenced by a written contract. Knowledge of a very different situation upon the part of Congress, with respect to transactions of this character, leads to the enactment of remedial statutes, whereby the court may ascertain

judicially whether the commission did or did not obligate the Government to do certain things, irrespective of whether they in fact reported their complete proceedings of what was done. In the absence of some express inhibition which withheld from the commission the right to contract upon any other basis than a written contract, the court under the jurisdictional act possesses jurisdiction to inquire into and adjudicate reciprocal rights upon what was said to have been done, and precisely what contracts and the terms thereof were entered into between the commission and the Indians. If the existence of an oral contract supplementary to and as understood by the parties to be part of the transaction, going directly to the consideration for the cession of the lands involved, was in fact consummated, then the written agreement reported does not reflect the true situation, resulting in the omission from the report to the President of an exceedingly important agreement.

In addition to the foregoing the special act confers jurisdiction upon the court to determine and adjudicate the issue as to whether there has been *a failure* upon the part of the United States to *pay any money* which may be *legally* or *equitably* due the Indians. The jurisdiction conferred by this provision is comprehensive. It is not confined to contracts, but obviously extends to a review of the transaction in all its detail and determine therefrom if either at law or in equity any obligation came into existence to pay the Indians certain sums. That Congress may enact legislation of this character is not denied, and the case of *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, sustains the authority of Congress to deal with tribal Indians and tribal Indian funds as in its wisdom it sees fit. The report of the Committee on Indian Affairs, H. R. No. 581, Sixty-sixth Congress, second session, page 6, states:

"It appears to this committee that in view of the facts and circumstances herein set forth an injustice has been done to the Iowa Tribe of Indians in Oklahoma, and that they have been induced to part with the residue of their reservation for a nominal consideration and with the understanding, at least on their part, that they would receive such additional compensation as might be given to adjoining Indian tribes holding lands of similar character. In view of the

fact that all Indian tribes contiguous and in the vicinity received much greater compensation for their residue lands than did the Iowas, and that they received only the small per capita allotments of 80 acres, and they were of such known friendly disposition that the Government agents went to them first in its policy of acquiring and opening to white settlement the surplus Indian lands, it would seem that these Indians have at least an equitable claim against the Government for an amount equal to that which other Indians of that locality received for lands of similar nature."

Manifestly Congress was convinced that the report of the commissioners and the consummation of the transaction by them was fraught with binding incidents which were not expressed in the written contract, and even so, that the contract as written does not express the actual agreement made between the parties, and in and of itself reflects an unconscionable bargain. We think it hardly essential to cite a long list of cases sustaining our jurisdiction to grant relief under the circumstances recited, where special acts substantially similar to the present one have been enacted. The Supreme Court has uniformly recognized the great disparity in intelligence between Indian tribes and commissioners deputized to obtain a cession of their reservations. Contracts, treaties, and agreements as the result of such negotiations have been repeatedly before the courts, and without exception the actual agreement as understood by the Indians has been enforced when it is clearly established that equity affords relief. The tribal Indians, as wards of the Nation looking to the Government for protection of their rights, are not to be foreclosed from asserting equitable claims because of the existence of an agreement purporting to express but which does not the actual agreement made. *United States* v. *Winans*, 198 U. S. 371; *Choctaw Nation* v. *United States*, 119 U. S. 1. In the last case cited the Supreme Court, speaking of a special jurisdictional act similar in its scope to the present one, held that the act operated to reopen in its entirety the claims of the Choctaws growing out of a series of treaties as well as an award made by the Senate. The Choctaw case involved many questions relating to the payment of com-

pensation for the loss of ceded lands, and in so deciding employed as a portion of the opinion the following language:

"The recognized relation between the parties to this controversy, therefore, is that between a superior and an inferior, whereby the latter is placed under the care and control of the former, * * * The parties are not on an equal footing, and that inequality is to be made good by the superior justice which looks only to the substance of the right, without regard to technical rules framed under a system of municipal jurisprudence, formulating the rights and obligations of private persons equally subject to the same laws."

See also *In re Northern Pacific Ry. Co.* v. *United States*, 227 U. S. 355.

The special jurisdictional act in the *Sisseton and Wahpeton case*, 277 U. S. 424, was not so broad or inclusive as the present one. In the *Sisseton and Wahpeton case* jurisdiction was limited to claims growing out of treaties or laws of Congress, and this court held that the limit of judicial authority was the ascertainment of rights and performance of obligations under the express terms of the treaties and laws of Congress. The Supreme Court affirmed our conclusions. The present statute enlarges the authority of the court, as previously observed, and is not identical with the one in the *Sisseton and Wahpeton case*. It is difficult to construe by comparison jurisdictional acts; the verbiage of each differs materially, and the subject matter to be adjudicated varies. Congress evidently intends, by affording the opportunity of adjudicating Indian rights, to see to it that all legal and equitable obligations emanating therefrom shall be fully discharged. It is not to be supposed that Congress intended for the court to depart from established legal principles and adjudicate the case upon any other basis, but if the proceedings as a whole as disclosed by the record erect legal or equitable rights pro and con, the court we think under the act is authorized to determine the issue of liability thereunder. It is most difficult in view of the isolated provisions of each special jurisdictional act to ascertain the scope and meaning of one act upon what has been held as to previous ones employing different terms and referring to different subject matters and adjudicated

upon different records. Rights emanating from treaties, contracts, and oral agreements are uniformly involved, and if a single document or documents are alone in issue, the prescribed course of the court is definitely marked, but upon an allegation as herein presented, the issue revolves not alone around the express contract but concerns an insistence that the written contract reported does not in all respects recite the actual agreement made and was procured by representations and promises which were not observed, and is by its terms unconscionable. We think it apparent that allegations of this character are sufficient to invoke the application of principles of equity. This court in the early case of *Braden* v. *United States*, 16 C. Cls. 389, exhaustively discussed the principles of construction applicable to special jurisdictional acts, and what was there said seems to have met with the approval of the Supreme Court in many later decisions, quite too familiar to cite.

The facts established by the record, and not disputed, show a comparatively small Indian tribe residing on an Executive reservation in Oklahoma. The Indians were one hundred per cent illiterate, not one could read or write. The principal chief was blind and helpless. No tribal government of any consequence existed, and despite the value of their lands they were distressingly poor, and except for Government annuities were near the point of starvation. Without the slightest evidence of tribal cohesiveness and the existence of wide divergence of sentiment, they were subject to the influence of arguments and persuasions not alone from the commissioners' intent on securing the reservation but from white settlers and others equally anxious for the surplus lands to become a part of the public domain. Under these circumstances and in consonance with the policy of the Government, it was manifestly the solemn duty of the commissioners to free their negotiations from all evidence of an intent to drive a bargain, and consummate only a just and fair settlement with an absolutely ignorant and dependent people. Without ascribing improper motives to the commissioners, the record at the very outset discloses an obvious and serious misconception of the Indians' title

to their lands, and the making of representations to the Indians, calculated to inspire fear, which had absolutely no basis in law or fact. Again the record points out that it required persuasion to induce the Indians to assent at all to the propositions of the commissioners, aside from the considerations offered in money and allotments. A special consideration was paid to one of the chiefs of the tribe, and despite all that could be offered or said, a considerable number of Indians absolutely declined to assent to the so-called agreement. We say this advisedly, for the anxiety of the commissioners to close the negotiations is evidenced by the fact that 62 out of a supposed total of 86 signed the agreement; 34 of the 62 were made up of members of but six Indian families, and one Indian and his wife not members of the tribe, as well as the signature of an unborn child, appear on the contract. Following the execution of the contract, allotments were made to 108 members of the tribe, so that in the end, as shown in Finding XII, the contract was assented to by 59 legitimate signatures, a small majority of the tribe. This is especially significant in view of the fact that no tribal government obtained, and the commission was put to the necessity of dealing with the Indians individually. Did the report of the commission and the contract transmitted reflect the actual agreement entered into and the terms thereof? We think it did not. The report contains the following paragraph:

"The commission is aware of the very limited extent of the Iowas' real title and interest in and to said tract of country, but their claim is absolute ownership, they believing, or assuming to believe, that an Executive order signed by the Great Father setting land apart for their permanent use and occupation, makes absolute title. The standard of intelligence among the Iowas makes it exceedingly difficult to make them understand that they have but a limited and qualified interest. Other negotiations in the Territory perfected and pending, and especially the Oklahoma purchase, have come to their knowledge, and their minds had become fixed upon allotments of one hundred and sixty acres to each member of the tribe and one dollar and a quarter an acre for the residue of the reservation; but the commission, knowing their title to be limited and their tenure even insecure, procured the contract herein described."

The quoted excerpt clearly discloses that the Indians did have *fixed* opinions upon the subject of their allotments in severalty and the *price* they should receive for surplus lands. It further shows that the very terms of the contract herein contended for were discussed and before the commissioners at the time the contract was signed. What then dissuaded the Indians and brought about a reversal of their "*fixed minds*"? The commissioners say it was accomplished by a representation that their title to their lands was precarious; that the commission was "aware of the *very* limited extent of the Iowas' real title and interest in and to said tract of country" (italics ours), and thereby "procured the contract herein described." *In re Wilson*, 140 U. S. 575. This is not all. In the present record is the oral testimony of witnesses, who are not Indians and in no way interested in the present litigation, one of whom was the clerk to the commissioners present when the negotiations continued, and the contract signed states with a degree of most convincing positiveness that the commissioners did agree that the Iowas were to get for their surplus lands the same as other Indian tribes, and this fact is distinctly corroborated by the positive testimony of several other white witnesses, wholly disinterested parties. The anxiety of the commissioners to consummate an advantageous agreement with the Iowas is, in view of the history of the case, one perhaps not censurable, proceeding from the fact that the duty cast upon the commission included negotiations of a similar character with a number of Indian tribes occupying contiguous and near-by reservations, and the Iowas being the first tribe visited the terms of an agreement with them would be available as a persuasive argument to induce neighboring Indians to do likewise. Disregarding the testimony of the surviving Indians, which is not bereft of probative effect, and relying exclusively upon the evidence of outside parties, we think the evidence taken in connection with the circumstances of the case clearly establishes the existence of an agreement, the terms of which are not expressed in the written contract, that the Iowa Indians were to receive additional compensation if increased prices were paid for contiguous and adjoin-

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ing reservations composed of lands of no greater value and situated in the same locality.

The commission did visit Indians occupying contiguous reservations and did agree to pay $1.25 per acre for their lands, and it was paid by the Government for lands of no greater intrinsic value than the Iowa reservation. The reservations of the Sacs and Foxes and the Kickapoos, whose reservations adjoined the Iowas, were visited immediately after the negotiations with the Iowas, and to them $1.25 was paid for surplus lands, and what is more, the commission did not succeed in procuring any Indian surplus lands for a lesser price from any Indian tribes. The commissioners reported and it is borne out by the facts that the entire consideration for the Iowa contract averages thirty-eight cents per acre for their lands.

The plaintiffs cite innumerable precedents to sustain the case. We do not think it essential to encumber this opinion with quotations from them. If we are correct in our construction of the jurisdictional act, we think the judgment we award follows.

The remaining claim is not vigorously pressed. The treaty between the Iowa Indians and the United States made on May 17, 1854 (10 Stat. 1069), provided a fund for the Indians arising from the sale of Indian lands. The United States invested certain amounts of this fund in Federal and State interest-bearing bonds—the amount is not in dispute. Interest on the bonds was duly collected and credited to the Indians up to January 1, 1861. Some time during 1860 the bonds were stolen by a clerk in the Secretary of the Interior's office. On July 12, 1862, Congress passed an act appropriating $66,735.00 to reimburse the Indians for the loss, and thereafter interest on this sum was credited semiannually to the Indians up to and including the year 1880. On April 1, 1880 (21 Stat. 70), the above sum was deposited in the Treasury to the credit of the Iowa fund, which fund bore interest at the rate of five per centum per annum. The sum of $5,032.23, the amount of interest accumulated upon the stolen bonds from the date of the last payment to the first day of July, 1862—in accord with the reimbursement act—was duly credited to the Iowas on September 11, 1862. The Iowa

Indians assented to this legislation. The act required their assent as a condition precedent, and their assent was filed with the Secretary of the Treasury on November 25, 1862.

The petition seeks to recover an alleged difference between the cost price of the stolen bonds and the par value of the same with interest. In addition to the lack of proof to sustain the contention, it is clear from the recited facts that the claim is without merit.

Judgment is awarded the plaintiffs for $254,632.59. It is so ordered.

SINNOTT, *Judge;* GREEN, *Judge;* MOSS, *Judge;* and GRAHAM, *Judge*, concur.

MAAS & WALDSTEIN CO. v. THE UNITED STATES

[No. H-156. Decided December 9, 1929]

On the Proofs

Income and profits taxes; special assessment; protest; claim for refund; interest on refund.—A request for special assessment under section 210 of the war revenue act of 1917, made at the time a taxpayer returns its income tax for tax purposes, is not such a claim for refund or protest within the meaning of section 1324 of the revenue act of 1921, as to entitle the taxpayer to interest on a refund made pursuant to the grant of special assessment.

Same; discretion in Commissioner of Internal Revenue; requisite of suit.—The granting of a special assessment under section 210 of the war revenue act of 1917, is within the discretion of the Commissioner of Internal Revenue, and neither a formal protest against assessment on any other basis nor a claim for refund on the ground that a special assessment should be granted, give the taxpayer the right to sue in the Court of Claims for interest on the amount eventually refunded pursuant to the special assessment.

Same; finality of allowance by Commissioner of Internal Revenue.—For the Court of Claims to give judgment for interest sued for on a refund made pursuant to a special assessment, where the Commissioner of Internal Revenue had refused to allow such interest, would be changing the amount found due by the commissioner, and this the court is precluded from doing under the *Williamsport Wire Rope Co. case*, 277 U. S. 551.

Reporter's Statement of the Case

Same; premature filing of refund claim.—A claim for refund of taxes can not legally be made until after they are paid.

The Reporter's statement of the case:

Mr. Harold S. Deming for the plaintiff. *Messrs. George E. Holmes*, *Randolph E. Paul* and *Charles B. McInnis*, and *Holmes, Paul & Havens* were on the briefs.

Mr. Charles R. Pollard, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. Ralph E. Smith* was on the brief.

The court made special findings of fact, as follows:

I. The plaintiff, Maas & Waldstein Company, is a domestic corporation organized and existing under the laws of the State of New Jersey with its principal office at 45 John Street, New York, New York.

II. Plaintiff, under date of February 5, 1918, addressed a letter to Daniel C. Roper, Commissioner of Internal Revenue, requesting that its excess-profits tax for the year 1917 be assessed under the provisions of section 210 of the revenue act of 1917. A true copy of this letter, marked "Exhibit No. 1," is attached to the petition and by reference is made a part hereof.

III. The plaintiff subsequently received from the Bureau of Internal Revenue a letter dated February 15, 1918, referring to its letter of February 5, 1918, requesting that the facts covering plaintiff's case be submitted to the Bureau of Internal Revenue in writing. A true copy of this letter, marked "Exhibit No. 2," is attached to the petition and by reference is made a part hereof.

IV. Plaintiff filed its income tax return for the year 1916, from which it appeared that the income tax due thereon was $20,542.01. Said tax was paid at the time and in the manner prescribed by law.

V. Plaintiff filed its corporation income and excess-profits tax return for the year 1917 on March 28, 1918, from which it appeared that the income and excess-profits tax due thereon was $1,508,400.25. The said tax was paid on June 20, 1918.

VI. Plaintiff filed its munitions manufacturers' tax return for the year 1917 on March 28, 1918, from which it appeared that the tax due thereon was $242,704.39. The said tax was also paid on June 20, 1918.

VII. Plaintiff attached to its income and excess-profits tax returns for the year 1917 a letter dated March 28, 1918, addressed to the Commissioner of Internal Revenue, Washington, D. C., in which it set forth its reasons why the tax should be computed under the provisions of articles 52, 18, and 24, regulations 41, revenue act of 1917. A true copy of said letter marked "Exhibit No. 3," is attached to the petition and by reference made a part hereof.

VIII. At the time the said corporation income and excess-profits and munitions manufacturers' taxes were paid, June 20, 1918, the plaintiff forwarded to William H. Edwards, collector of internal revenue for the second district of New York, a letter dated June 14, 1918, reiterating the statement as to what provisions of regulations 41 applied. A true copy of said letter, marked "Exhibit No. 4," is attached to the petition and by reference made a part hereof.

IX. On the 7th day of November, 1917, the Commissioner of Internal Revenue made an assessment of the underpayment of tax against the plaintiff for the year 1916 in the sum of $1,731.50 and scheduled the same to the collector of internal revenue referred to above.

X. On the 14th day of November, 1917, plaintiff paid to the said collector the sum of $1,731.50, which represented an underpayment of tax for the year 1916.

XI. Plaintiff under date of December 30, 1921, filed with the collector of internal revenue for the second district of New York a claim for refund of $2,476.22 income tax for the year 1916 and of $462,287.07 income and excess-profits tax for the year 1917. A true copy of said claim for refund, marked "Exhibit No. 5," is attached to the petition and by reference made a part hereof.

XII. The Commissioner of Internal Revenue after an examination of the munitions manufacturers' tax return for the year 1917 determined an underpayment of the tax for said year in the amount of $8,642.16.

XIII. On February 15, 1922, the collector of internal revenue for said district mailed to plaintiff notice and demand for the payment of said underpayment of tax. On February 24, 1922, plaintiff filed a claim for the abatement of the underpayment of tax in the sum of $8,642.16.

XIV. On the 15th day of April, 1922, the Commissioner of Internal Revenue approved a schedule of overassessments known and designated as Schedule IT: A: 948, on Form 7777. Said schedule of overassessments embraced, among other overpayments, overpayments in favor of plaintiff in the sum of $2,476.23 for the year 1916 and $462,038.34 for the year 1917. Said schedule of overassessments was transmitted to the collector of internal revenue for the second district of New York for his action in accordance with the direction appearing thereon.

XV. The said collector of internal revenue complied with the directions appearing thereon and on May 6, 1922, returned said schedule to the Commissioner of Internal Revenue, together with Schedule IT: R: 948 on Form 7777A.

XVI. On or about May 6, 1922, the collector of internal revenue mailed to plaintiff a copy of certificate of overassessment in the sum of $2,476.23, for the year 1916. A true copy of said certificate of overassessment is attached to plaintiff's petition, marked "Exhibit 6," and by reference made a part hereof.

XVII. On or about May 6, 1922, the collector of internal revenue mailed to plaintiff a copy of certificate of overassessment in the sum of $462,038.34 for the year 1917. A true copy of said certificate of overassessment is attached to plaintiff's petition, marked "Exhibit 7," and by reference made a part hereof.

XVIII. The collector of internal revenue on schedule of overassessments IT: R: 948 credited part of the overpayment of the taxes in the sum of $462,038.34 for the year 1917 against the underpayment of the munitions manufacturers' tax of $8,642.16, leaving an amount to be refunded in the sum of $453,396.18, and returned said schedule of overassessments to the said commissioner, as set forth in Finding XV herein.

XIX. On the 27th day of June, 1922, the Commissioner of Internal Revenue approved a schedule of overassessments known and designated as Schedule IT:A:1528 on Form 7777. Said schedule of overassessments embraced, among other overpayments, an overpayment in favor of the plaintiff in the sum of $20,520.00. Said schedule of overassessments was transmitted to the said collector for his action in accordance with the direction appearing thereon.

XX. The collector of internal revenue complied with the directions appearing on said schedule of overassessments and on July 25, 1922, returned said schedule of overassessments to the commissioner, together with Schedule IT:R:1528, on Form 7777A.

XXI. On or about August 1, 1922, the collector of internal revenue mailed to plaintiff a copy of certificate of overassessment in the sum of $20,520.00, munitions manufacturers' tax for the year 1917.

XXII. Under date of June 14, 1922, the Commissioner of Internal Revenue mailed a letter in which plaintiff was informed that a reexamination of its income and excess-profits tax returns for the year 1917 disclosed that the tax for said year had been underpaid by $4,696.97.

In August, 1922, the Commissioner of Internal Revenue made an additional assessment of the underpayment of tax against plaintiff for said year in the sum of $4,696.97.

XXIII. The schedule of refunds for the refunding of $2,476.23 and $453,396.18 was signed by the Commissioner of Internal Revenue on May 9, 1922, and schedule of refunds for the refunding of $20,520.00 was signed on August 3, 1922, and Treasury warrants for the said amounts were thereafter issued to plaintiff.

XXIV. Plaintiff has been allowed no interest on overpayments shown on said schedules for the years 1916 and 1917.

XXV. Plaintiff has paid no interest on the underpayment of $4,696.97 for the year 1917, or any part thereof.

XXVI. Under date of August 4, 1923, the Commissioner of Internal Revenue by letter to plaintiff refused to allow interest upon the overpayment of income and excess-profits taxes for the year 1917.

XXVII. Subsequent to August 4, 1923, the plaintiff filed with the Commissioner of Internal Revenue another request for interest on the overpayment of corporation income and excess-profits taxes for the year 1917, and under date of February 14, 1927, the commissioner by letter to plaintiff's attorneys again refused to allow interest on the said overpayment.

The court decided that plaintiff was entitled to recover, in part.

GRAHAM, *Judge*, delivered the opinion of the court:

This case involves a claim for interest on a claimed allowance of a refund. It grows out of the application to the facts, which will be briefly stated, of the following provisions of the revenue act of 1921, 42 Stat. 316:

"SEC. 1324. (a) That upon the allowance of a claim for the refund of or credit for internal-revenue taxes paid, interest shall be allowed and paid upon the total amount of such refund or credit at the rate of one-half of 1 per centum per month to the date of such allowance, as follows: * * *

"(2) If such amount was not paid under protest but pursuant to an additional assessment, from the time such additional assessment was paid; * * *."

The plaintiff states its contentions as follows:

1. That it should be allowed interest on the overpayment of 1916 income tax in the amount of $1,731.50, from November 14, 1917, the date on which the additional assessment was paid, to May 9, 1922, the date on which the schedule was signed by the Commissioner of Internal Revenue allowing the refund.

2. That it should be allowed interest on the amount of $457,341.37, representing the net overpayment of income and excess-profits taxes for the year 1917 ($462,038.34 less $4,696.97) from the date on which said taxes were paid, June 20, 1918, to the date on which the schedule allowing the said refund was signed by the commissioner, May 9, 1922.

3. That if this court should decide that its income and excess-profits taxes for the year 1917 were not paid under a specific protest within the meaning of section 1324 (a) (1) of the revenue act of 1921, it should be allowed interest

on the above-mentioned overpayment of $457,341.37 from six months after June 20, 1918, to May 9, 1922.

The defendant's contention in reply admits the first contention of plaintiff, and confines itself in its defense to the second upon the grounds—

(1) That the plaintiff, as required by the act, filed no specific protest when paying the tax; and

(2) That it filed no claim of refund in connection with the payment of said tax.

It would profit nothing in reaching a conclusion in the case to go into the details of the figures and facts involved. The questions first to be considered are those raised by the defendants as to whether the plaintiff "paid under a specific protest" and whether the allowance of overpayment was based upon a claim for a refund; that is to say, whether a claim for a refund was ever filed. The facts stated generally and in effect are as follows:

In February, 1918, before paying its taxes for the year 1917, plaintiff communicated with the Bureau of Internal Revenue, stating that it would like to have an opportunity to lay before the commissioner the operation of law in its case, and to obtain his opinion as to whether or not the bureau would consider its statement as justifying an assessment under section 210 of the act.

Section 210 of the revenue act of 1917, gave to the Secretary of the Treasury and the Commissioner of Internal Revenue power to grant relief to taxpayers where invested capital could not be satisfactorily ascertained and it appeared that a taxpayer was paying a larger tax than other companies engaged in a like or similar trade or business. It is to be noted in passing that this section was passed upon by the Supreme Court in the *Williamsport Wire Rope Co. case*, 277 U. S. 551, 561, which held that this court had no jurisdiction to review the conclusions of the Commissioner of Internal Revenue in ascertaining invested capital under this section and granting relief thereunder. Section 210 is not a taxing statute, and a protest against the commissioner's conclusion or decision under it would be futile, and even if it were made, would not entitle the plaintiff to relief in this court on account of either failure to make a special assess-

ment or from an assessment which had been made and was unsatisfactory to the taxpayer, or a refusal to make a special assessment or make any change with regard to the plaintiff's invested capital, leaving it as under the return.

Thus it appears that the plaintiff was asking for a hearing under this section, and to its request the commissioner replied on February 15, 1918, suggesting that it file a statement of the facts in writing covering its case, which statement would receive consideration. On March 28, 1918, plaintiff filed its tax return for the year 1917 and accompanied it with a statement of the character suggested by the commissioner relative to a special assessment under section 210. In this statement it claimed that its tax under the requirements of the return was "proportionately larger than that of other representative concerns in the same line of business;" further, that the simple form and manner of its organization placed it "at a disadvantage in comparison with representative concerns in a similar trade or business," and that under paragraph 4, article 52 of the regulations, its "invested capital, when computed in the manner specified in the regulations, is manifestly seriously disproportionate to the taxable income" and concluded: "We request assessment in the manner provided for in article 52, referring also to articles 18 and 24, Regulation No. 41."

It thereafter paid the tax according to its return, on June 20, 1918, and in doing so stated that, together with its returns for corporation income tax, excess-profits tax, and munitions tax "we filed a request on May 28 for assessment in the manner provided for in article 52, referring also to articles 18 and 24, Regulations 41."

On May 6, 1922, the commissioner mailed to the plaintiff a copy of certificate of overassessment in connection with said taxes of $462,038.34 and thereafter paid a refund to the plaintiff on this basis, the details of which it is not necessary to note at this point.

The plaintiff is contending that it asked for a special assessment and indicated its opinion that the amount assessed against it under its return was out of proportion to that assessed against corporations in a similar line of business, and that this request for a special assessment was a protest

within the meaning of said section 1324 (a) of the revenue act of 1921 and also constituted a claim for a refund.

The question is, Did it amount to a protest within the meaning of section 1324 (a), and was it a claim for a refund within the meaning of that section? Taking up, first, the question of "protest" it is a term indicating disagreement or objection by the party making it and conveying to the other party this state of mind, and expressing disapprobation or dissent. What constitutes a protest in each case depends upon the facts which embody it. It is true that in the case of *Greenport Basin & Construction Co.* v. *United States*, 260 U. S. 512, the United States Supreme Court seems to have upheld the view of the lower court that a claim for abatement amounted to a protest, but it is to be observed here that visiting the plaintiff with knowledge of the law, it did not file a specific protest and it did not ask for an abatement. It simply requested a hearing by the commissioner on a matter that was entirely within the discretion of the commissioner to grant, upon the ground that otherwise it would be treated unfairly and called upon to pay taxes disproportionate to other companies in the same line of business. It was granted a refund not because it would have been illegally assessed had the commissioner refused to grant it, because had he refused the plaintiff would have been without remedy, as the matter was within his discretion, even if it had filed a formal protest and a formal claim for a refund. Had the plaintiff been refused relief, even granting that its statement was a claim for a refund, it could not have on appeal secured relief in this court. So that, visiting the plaintiff with knowledge of the law, it is not to be supposed that it intended either to file a protest or a claim for a refund.

A request for a special assessment, therefore, under these circumstances, does not convey the idea, the thought, or conviction that it was intended as or was a protest, or a claim for a refund, since it is clear that neither one would have been of any benefit to it as far as the decision of the commissioner was concerned. The commissioner made a special assessment and allowed it a refund. He did not allow but refused interest, and the plaintiff here is in effect asking the court to increase the allowance of the commissioner by allowing interest and passing upon his decision in a matter where

his decision was final, and as to which this court has no jurisdiction. We think we are precluded under the decision in the *Williamsport Wire Rope case*, *supra*, from doing so, as to do so would be to change the amount found by the commissioner. More than that, we further are of opinion that section 1324 (a) does not apply to a request for a special assessment but only to claims where the action of the commissioner is subject to review by this court. The plaintiff by the assessment under its return had not been illegally assessed as to its invested capital, for the decision of the commissioner was final and legal.

But, aside from this, we are of the opinion that the request for a hearing and the subsequent statement filed do not constitute a protest within the meaning of the act. It is something different from a request for an abatement. It is merely a request to the commissioner to take some action in a matter where his decision was final. For the same reason we think it was not a claim for a refund. Further, the taxes had not been paid, the commissioner had indicated an intention to consider the plaintiff's suggestion, and the plaintiff was simply filing facts embodying its suggestion for consideration. There is nothing to show what amount was claimed or just how an amount could be arrived at. It was not known what the decision of the commissioner would be and it must have known that should the decision be adverse to it it could not recover on a claim as for refusing a refund.

In *Kings County Savings Institution* v. *Blair*, 116 U. S. 200, it was held that a claim for a refund could not be legally made until after the taxes had been paid. This asserted claim was filed simultaneously with the return, and the taxes were not paid until June 20, 1918. We are of the opinion that the plaintiff is not entitled to recover under its contention numbered 2 above. The plaintiff is entitled to recover under its contention numbered 1, as set forth above, interest on the sum of $1,731.50 from November 14, 1917, to May 9, 1922. Let judgment be entered accordingly.

WILLIAMS, *Judge*, and LITTLETON, *Judge*, did not hear and took no part in the decision of this case.

GREEN, *Judge*, and BOOTH, *Chief Justice*, concur.

EDWARD F. MANEELY, ADMINISTRATOR ESTATE OF JAMES F. MANEELY, DECEASED, AND EDWARD F. MANEELY, TRADING AS THE JOHN MANEELY CO., v. THE UNITED STATES

[No. H-134. Decided December 23, 1929]

On the Proofs

Termination of contract; material furnished on order of subcontractor; liability of Government; privity; consideration.—Plaintiff, on order of a subcontractor, delivered for its account to the Government material required in the performance of a cost-plus contract, which provided for the making of subcontracts, and on termination thereof, effected according to its terms, the Government settled with the prime contractor and all subcontractors, but not with plaintiff. The cost-plus contract gave reimbursement to the contractor of actual net expenditures as might be approved or ratified by the contracting officer, and provided (1) that upon termination "the contracting officer shall assume and become liable for all such obligations, commitments, and unliquidated claims as the contractor may have theretofore, in good faith, undertaken or incurred in connection with said work," and (2) that when the contracting officer performed the duty so incumbent upon him on termination, the United States and the contracting officer should be released of all claims on the part of the contractor. *Held*, that these two provisions constituted a promise by the defendant for the benefit of the plaintiff, the consideration for which was the abandonment by the contractor of the claim which it otherwise would have against the defendant.

Same; statute of limitations; approval by contracting officer.—Under the circumstances recited the statute of limitations did not begin to run until expenditure for the material had been approved by the contracting officer.

The Reporter's statement of the case:

Mr. Herbert S. Ward for the plaintiff. *Mr. W. D. Jamieson* was on the briefs.

Mr. John E. Hoover, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. During the times hereinafter mentioned, Edward F. Maneely and James F. Maneely were partners, doing business under the firm name and style of the John Maneely Company, with their principal office and place of business in the city of Philadelphia, in the State of Pennsylvania. James F. Maneely departed this life on August 30, 1926, and Edward F. Maneely was appointed administrator of his estate.

II. On March 27, 1918, the United States entered into a written contract with the Maryland Dredging & Contracting Company, a corporation, by which said corporation obligated itself to furnish certain material, etc., for construction work at the Aberdeen Proving Ground in the State of Maryland; and on July 1, 1918, the said corporation entered into a subcontract with Riggs, Distler & Stringer, Inc., by which the last-named corporation obligated itself to furnish certain materials, etc., for the same work. A copy of the contract with the Maryland Dredging & Contracting Company is attached to plaintiff's petition, marked "Exhibit A," and is made a part hereof by reference. A copy of said subcontract was also introduced in evidence and is made a part hereof by reference. Both of these contracts were what is commonly known as "cost-plus contracts," and under and through them the Government was to pay under certain conditions, the cost of material, etc., furnished, together with an additional sum as compensation to the contractor.

III. Article II of the contract with the original contractor provided, among other things, as follows:

"*Cost of the work.*—The contractor shall be reimbursed in the manner hereinafter described for such of its actual net expenditures in the performance of said work as may be approved or ratified by the contracting officer and as are included in the following items:

"(a) All labor, material, machinery, * * *."

The original contractor, the defendant, and the John Maneely Company, all treated the foregoing provisions as requiring that all bills for material furnished to be used under the contract should be approved or ratified by the contracting officer before being paid by the defendant.

Article VIII of the contract with the original contractor contained among others, the following provisions:

"*Abandonment of work, by contracting officer.*—If conditions should arise which in the opinion of the contracting officer make it advisable or necessary to cease work under this contract, the contracting officer may abandon the work and terminate this contract. In such case the contracting officer shall assume and become liable for all such obligations, commitments, and unliquidated claims as the contractor may have theretofore, in good faith, undertaken or incurred in connection with said work; * * *. When the contracting officer shall have performed the duties incumbent upon him under the provisions of this article, the contracting officer and the United States shall thereafter be entirely released and discharged of and from any and all demands, actions, or claims of any kind on the part of the contractor hereunder or on account hereof."

IV. As the work progressed under the contract referred to in Finding II, the constructing officer at the Aberdeen Proving Ground issued orders to the corporations named in Finding II for the material that was necessary to perform the contract, and purchase orders were issued covering the same. Sometime in the month of August, 1918, the said constructing officer ordered Riggs, Distler & Stringer, Inc., to furnish certain quantities of steel pipe to be used in the performance of the contract. Sometime in the month of August, 1918, Riggs, Distler & Stringer, Inc., gave an order to the John Maneely Company to furnish and deliver with other articles the pipe involved in this suit to the constructing officer at the Aberdeen Proving Ground for the account of said Riggs, Distler & Stringer, Inc., which order was carried out by the said John Maneely Company, and the pipe so delivered accordingly in September, 1918.

Immediately after November 11, 1918, the contractor and subcontractor mentioned in Finding II were notified to discontinue the performance of the work under their contracts, and under date of December 15, 1918, the constructing officer sent both a written notice canceling the contract and subcontract hereinabove referred to. At the same time the constructing officer authorized and directed the Maryland Dredging & Contracting Company to give notice through

the newspapers that all bills for materials supplied previous to December 15, 1918, that were outstanding and unpaid on that date should be submitted to the constructing officer at the Aberdeen Proving Ground for payment direct. At the last-named date the bill for the pipe furnished by the said John Maneely Company had not been paid and was an obligation against the subcontractor, but the Government did not pay the contractor or subcontractor for the pipe that had been delivered as above set forth. The evidence does not show that any of the construction work was carried on after November 11, 1918, or in any way what was done with the pipe or what use was made of it after it was delivered at the Aberdeen Proving Ground. The vouchers that were subsequently issued for the payment of the pipe, and are hereinafter referred to in these findings, together with receiving reports made by United States Army officers, show that the pipe had been ordered for the Government and delivered at the Aberdeen Proving Ground with other material. A letter written by the commanding officer at the Aberdeen Proving Ground April 25, 1922, directed to the General Accounting Office "through the Ordnance Office," with reference to the account of the John Maneely Company, inclosed for approval a voucher in the amount of $3,237.05 in favor of the John Maneely Company, and stated that the "receipt of the material covered by attached invoices had been questioned and it was only recently established that it was received on this project, and that the account was unsettled."

V. Pursuant to the notice referred to in the preceding finding, the John Maneely Company presented to the constructing officer a bill for the pipe furnished as above stated. A dispute arose as to the amount of the bill, which continued for several years. In the early part of January, 1922, the constructing officer determined that the value of the pipe furnished was $5,840.50. The original bill rendered by the John Maneely Company was in excess of this amount, but that company accepted the determination of the constructing officer as to the amount due and submitted a corrected bill accordingly, in the early part of January, 1922.

On January 24, 1922, two public vouchers, one for the sum of $2,603.45 and the other for the sum of $3,237.05, aggregating a sum of $5,840.50, covering payment for the pipe furnished by the John Maneely Company were prepared and approved by the commanding officer at the Aberdeen Proving Ground. The amounts so stated in these vouchers were the value of the material furnished in the manner above stated by the John Maneely Company and used in the performance of the subcontract, no part of which has been paid by the Government of the United States. These two vouchers were certified to the Comptroller General of the United States for settlement and by him disallowed on the ground that no privity of contract existed between the John Maneely Company and the United States.

The court decided that plaintiffs were entitled to recover $5,840.50.

GREEN, *Judge*, delivered the opinion of the court:

Plaintiff in this case brings suit to recover the value of certain pipe furnished to the Government and used in construction work on the Aberdeen Proving Ground, at Aberdeen, Maryland. The pipe was furnished by the John Maneely Company, a partnership in which James F. Maneely was a partner. He subsequently died, and the other partner, Edward F. Maneely, became administrator of the estate of the deceased. The John Maneely Company still continued in business and is the plaintiff in the suit.

The evidence shows that the Maryland Dredging & Contracting Company entered into a "cost-plus contract" with the defendant to furnish certain material, etc., for construction work on the Aberdeen Proving Ground, the Government to pay under certain conditions the cost of what was furnished under the contract and an additional sum by way of compensation to the contractor. The contract provided for the making of subcontracts and also provided for the termination of the contract when the contracting officer deemed it advisable, and further that in case the contract was so terminated, the "contracting officer shall assume and become liable for all such * * * unliquidated claims as

the contractor may have theretofore, in good faith, undertaken or incurred in connection with said work." The Maryland Dredging & Contracting Company entered into a subcontract with Riggs, Distler & Stringer, Inc., by which the last-named corporation obligated itself to furnish certain materials, etc., for the same work. The constructing officer at the Aberdeen Proving Ground issued an order, or orders, for a certain amount of pipe and other materials, which was transmitted to the subcontractor, which in turn directed the John Maneely Company to furnish the pipe so ordered and deliver it at the Aberdeen Proving Ground for the account of the said Riggs, Distler & Stringer, Inc. The John Maneely Company carried out this order and so delivered the pipe involved in this case sometime in September, 1918. In November following the constructing officer ordered the work on the contract stopped, terminated the contract with the original contractor, and gave notice that the contract with the subcontractors had been terminated. About the same time, the constructing officer authorized and directed the original contractor to give notice that all bills that were outstanding at a specified date should be submitted to him for payment. In making settlement with the other contractors, the Government did not pay for the pipe furnished by the John Maneely Company and involved herein.

Pursuant to the notice given by the constructing officer the John Maneely Company presented its bill for the pipe that was so furnished, but the bill was not approved, the Government officials claiming that the bill was excessive and the receipt of some of the pipe was questioned. After a prolonged dispute of some three or four years, the Government officials admitted the receipt of the pipe and approved the claim in the amount of $5,840.50. This value was less than had been claimed by the Maneely Company, but that company accepted this determination, and in January, 1922, two vouchers were prepared and approved by the commanding officer at the Aberdeen Proving Ground covering payment for the pipe so furnished in the total amount of $5,840.50, which was the fair value of the pipe. In due course these vouchers were certified to the Comptroller General and by him disallowed on the ground that no privity of contract

existed between the John Maneely Company and the Government.

The defense made herein is, first, that there is no privity of contract between the United States and the plaintiff, who was a subcontractor; and second, that in any event the statute of limitations has run against the claim.

Considering the point first named, it will be observed that the contract gave the contracting officer the right to abandon the work and terminate the contract, but in such case made the contracting officer liable for such unliquidated claims as the contractor may have in good faith incurred in connection with the work. The contract also provided in substance that when the contracting officer conformed to the provisions above stated the United States should be discharged from all claims on the part of the contractor. See Finding III. These provisions clearly constituted a promise for the benefit of the plaintiff, for although plaintiff was not named in the contract, it held an unliquidated claim at the time the contract was terminated. It is a well-settled rule that a party may maintain a suit on a promise made to another for his benefit. *Hendrick* v. *Lindsay*, 93 U. S. 143. There are some limitations to this rule, which are well expressed in *Vrooman* v. *Turner*, 69 N. Y. 280, as follows:

"There must be, first, an intent by the promisee to secure some benefit to the third party, and second, some privity between the two, the promisee and the party to be benefited, and some obligation or duty owing from the former to the latter which would give him a legal or equitable claim to the benefit of the promise."

The facts in the case at bar are clearly covered by the doctrine as above stated. The instant case, however, is not one of novation; that is, it is not a case where for a consideration one promises to pay the debt of another. It is simply a case where A, owing a debt to B, agrees to pay the amount thereof to C, and B, under the provisions of the agreement, is thereupon to have no claim against A. The consideration, of course, is the abandonment by B of the claim which he would otherwise have had. In our opinion the suit is clearly upon a contract made for a valuable consideration, and is one over which this court is given jurisdiction.

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As before stated, the second point made on behalf of the defendant is that the claim is barred by the statute of limitations, and in support of this claim it is urged that the claim of plaintiff accrued when the pipe was furnished and supplied to the defendant, which was more than six years before the action was commenced.

In order to determine whether the statute had run against plaintiff's claim, it will be necessary to analyze the contract, which is very loosely drawn and must be interpreted in the light of the surrounding circumstances and the consequent understanding of the parties. From what has already been said, it will be seen that it was what is commonly known as a "cost-plus contract." One thing, however, is definitely fixed by the contract and that is that defendant was not to pay whatever cost or price the original contractor might have paid or agreed to pay for material furnished. On the contrary, the amount to be paid, and whether it was to be paid at all, was determined by a provision that the contractor should be reimbursed for "such of its actual net expenditures in the performance of said work as may be approved or ratified by the contracting officer * * *." (See Finding III.) This is the only provision with reference to payment and under its terms nothing was due until such ratification or approval took place. Up to that time, the original contractor had no claim against the Government under the contract. While this provision in terms applies only to the "contractor," we think it was clearly understood between the contracting parties that it applied also to the claims which might be made upon the termination of the contract by a subcontractor or other party furnishing materials upon order of the subcontractor, and such was the interpretation put upon it by the Government officials who entered into the contract on behalf of the defendant, and whose duty it was to approve or disapprove the claims made under the contract. Plaintiff, the original contractor, and the defendant, all treated the contract as requiring that all bills should be submitted to the contracting officer and not paid until he had approved them. This fact shows clearly what the understanding of the parties was. We think also that this was a fair and reasonable construction

of the contract. Any other construction would have placed the Government at the mercy of the contractor in acting under a cost-plus contract. While the provision, on first consideration, seems to be harsh, it was necessary. Otherwise, the Government would be liable merely on a showing that the contractor had furnished certain materials and paid a certain amount therefor, regardless of whether the amount paid was reasonable or proper. There must be some limitation on the amount for which the Government would be liable and the parties agreed upon these terms, evidently having confidence that the contracting officer would act in an equitable manner.

The principle that the construction which the parties to a contract put upon it will prevail over the literal terms thereof, adopted in *District of Columbia* v. *Gallaher*, 124 U. S. 505, 510, is applicable in construing the contract. It should be noted also that the provision under which we have found the plaintiff was entitled to bring this suit applied only to unliquidated claims, that is, claims the amount of which had not been determined. This showed that it was intended that the amount should be determined by the contracting officer in the manner provided in the contract.

It is evident that the claim of plaintiff did not accrue when the pipe was furnished, as contended by defendant. At that time there was no liability on the part of the defendant to the plaintiff for two reasons: First, because the plaintiff did not deliver the pipe for itself, but for and on account of the subcontractor. This alone would show that at that time there was no rightful claim on the part of the plaintiff against the defendant. Second, as defendant never ordered any pipe from plaintiff, no liability on the part of defendant to plaintiff could arise until after the contract had been canceled, when the promise to pay plaintiff the amount of the debt originally owing to the subcontractor went into effect. But even then, as has been shown above, the defendant was not bound under the contract to pay the claim until it was approved or ratified by the contracting officer or his successors. The cases cited on behalf of defendant as holding that its liability accrued

when the materials were furnished are based upon an altogether different state of facts and have no application here.

While the case has been presented on behalf of defendant solely on the theory that the liability of defendant accrued when the pipe was furnished, we do not overlook that in the further presentation of the case another theory may be suggested. It might be argued that plaintiff was not compelled to wait indefinitely or for several years, as it did, for the contracting officer to pass upon its claim, and that it must have been understood by the parties to the contract that this determination would be made within a reasonable time; and if not made within a reasonable time plaintiff could disregard the original contract and bring suit on an implied contract to pay the value of the pipe, if it had been taken over or used by the Government. There is, however, no evidence as to what would have been a reasonable time. So also, it may be said that independently of the theory just set forth plaintiff was not obliged to accept the terms of the original contract to which it was not a party, but could elect if it saw fit to disregard the written contract and bring a suit for the value of the pipe on an implied contract to pay for the same. Possibly it would be a sufficient answer to say that plaintiff did not so elect but proceeded in accordance with the terms of the original contract, and finally in 1922 its claims were approved and ratified. But we have no occasion to determine any questions that may arise as to the right of the plaintiff to bring suit on an implied contract. Conceding for the sake of the argument only that a cause of action arose on an implied contract by reason of the Government having taken over the pipe and treated it as its own, although it had not ordered the pipe, the question still remains as to what time this taking took place. In this connection it will be observed that there is nothing in the evidence to show that the Government ever used the pipe. The original construction work having been stopped shortly after the pipe was received, the probabilities are that it was never used in the work contemplated by the original contract. As before stated, in 1922 the dispute over whether the pipe had been received and as to what its value was, was ended by an

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agreement between the successor to the contracting officer and the plaintiff as to the value of the pipe, and the issuance of vouchers for the amount agreed upon, which vouchers were not approved by the Comptroller General. The vouchers and documents supporting them together with other evidence show that the defendant did in fact receive the pipe, that it had been originally ordered from the contractor for use in performing the original contract, and that it was delivered on account of the subcontractor. But all of this relates back to the original contract and we are now considering whether a cause of action would arise under an implied contract. There being no evidence as to the pipe being used by the Government or when it was taken over, a cause of action could not arise until the pipe was accepted by the Government, and this acceptance did not occur until an agreement was reached as to the value of the pipe and vouchers were issued for payment of the value agreed upon. The fact that it had been received by the Government and vouchers were issued showed an acceptance of the pipe. The pipe having been ordered in the first instance on approval, the circumstances were much the same as where some person orders a suit of clothes on approval and after delivery of the suit a long dispute ensues as to the liability of the party who ordered it. Finally the dispute is ended by the acceptance of the suit on the part of the person who ordered it and an agreement between the parties as to the price to be paid for it. Under such circumstances a court will not concern itself as to whether the suit was ever worn but will hold that the party ordering the suit is liable for the agreed price. So in this case the defendant, having accepted the pipe and agreed with plaintiff as to the price to be paid for it, is liable for the payment of this agreed price whether it ever made use of it or not. So far as we have any evidence in the case before us, there is nothing to show that the cause of action herein accrued at any earlier date than the time when the pipe was accepted. The Government may have taken charge of the pipe and treated it as its own at some time prior to the date when the parties agreed on the value of the pipe and it was accepted, but there is nothing in the evidence to show this. The burden of proof is upon the

Syllabus

defendant to show that plaintiff's cause of action accrued more than six years prior to the commencement of this suit. Whether this cause of action be considered to be one founded on the provisions contained in the original contract, with reference to unliquidated claims at the time of the cancellation thereof; or to be one arising upon an implied contract, the defendant has failed to show that it accrued within such time that it is barred by the statute of limitations.

These views make it unnecessary to consider other propositions advanced by counsel for plaintiff in support of its claim. It follows that plaintiff is entitled to recover as prayed in its petition, and judgment will be rendered accordingly.

WILLIAMS, *Judge*, and LITTLETON, *Judge*, did not hear and took no part in the decision of this case.

GRAHAM, *Judge*, and BOOTH, *Chief Justice*, concur.

LILLIAN R. WARREN, AS EXECUTRIX OF THE ESTATE OF JAMES VINSON WIGGINS, v. THE UNITED STATES[1]

[No. K-327. Decided December 23, 1929]

On Demurrer to Petition

Treasury Savings Certificates; naming of beneficiary; recovery by executrix of owner's estate; law of domicile.—Under the statute authorizing the Secretary of the Treasury to issue war-savings certificates the Secretary had the power to prescribe the terms and conditions of their payment, and the Secretary's due regulations with respect thereto had the force and effect of law. Where the owner of such certificates named the beneficiary thereof, in case of his death, and the regulations provided for payment to such beneficiary in that event, the refusal of the Secretary to make payment to the executrix of the owner's estate was in conformity to the provisions of the contract thus entered into with the owner of the certificates, and the executrix is not entitled to recover from the United States the money represented by the certificates, notwithstanding the laws of devolution of property in the State of the testate's domicile.

[1] Certiorari denied.

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The Reporter's statement of the case:

Mr. Heber H. Rice, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the demurrer.

Mr. Arthur H. Bartelt, opposed.

The opinion states the material averments of the petition.

GRAHAM, *Judge*, delivered the opinion of the court:

This case was argued and submitted on demurrer. It is a suit by the plaintiff as executrix of the estate of one Wiggins to recover money represented by certain Treasury Savings Certificates, payable on their face to certain beneficiaries, possession of which is held by the plaintiff as executrix, and which the Secretary of the Treasury on demand by her refused to pay, at the same time informing her "that he would refuse to pay the proceeds of said certificates to any one except the parties named on said Treasury savings certificates, or their duly authorized assignees, or the administrators or executors." A copy of one of said certificates appears in footnote.[1]

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[1] (Front of certificate)

THE UNITED STATES OF AMERICA TREASURY SAVINGS CERTIFICATE
Issue of War-Savings Certificates
Act of September 24, 1917, as amended and supplemented
ONE HUNDRED DOLLARS
THIS CERTIFIES THAT, SUBJECT TO THE TERMS AND CONDITIONS HEREINAFTER SET FORTH

(100)
A C-5945252

James Vinson Wiggins, payable in case of death to
Robb R. Rankin 301 E. Dewey Place
Name of owner in full No. Street Series
San Antonio, Texas, five years from April 2, 1923
City or Town State Month Day Year

The date of issue hereof will be entitled to receive the sum of One Hundred Dollars, or, at his option, upon presentation prior to maturity, the lesser amount indicated in the table appearing on the back hereof for the respective months following issue. This certificate is one of an issue of Treasury Savings Certificates, dated September 30, 1922, authorized by the act of Congress, approved September 24, 1917, as amended and supplemented, and issued pursuant to Treasury Department Circular No. 301, dated September 30, 1922, to which reference is hereby made for a statement of the further rights of holders as fully and with the same effect as if herein set forth. The Treasury Savings Certificates issued within any one calendar year constitute a separate series, under the serial designation of the year of issue. It is not lawful for any one person at any one time to hold Treasury Savings Certificates of any one series to an aggregate amount exceeding five thousand dollars, maturity value.

Payment of this certificate will be made upon presentation and surrender hereof, by mail or otherwise, at the office of the Secretary of the Treasury,

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The plaintiff alleges that the certificates " were duly issued by the Treasury Department pursuant to the authority of section 6 of the act of Congress approved September 24, 1917, as amended, which is also known as title 31, section 757, United States Code, and reads as follows:

" § 757. Second and Third Liberty Loans; Additional Loans; War-Savings Certificates.—In addition to the bonds authorized by section 752 of this title and the certificates of indebtedness authorized by section 754 of this title, the Secretary of the Treasury is authorized to borrow from time to time, on the credit of the United States for the purposes of sections 752 to 754, 757, 758, 760, 764 to 766, 769, 771, 773, and 774 of this title and to meet public expenditures authorized by law, such sum or sums as in his judgment may be necessary, and to issue therefor, at such price or prices and upon such terms and conditions as he may determine, war-savings certificates of the United States on which interest to maturity may be discounted in advance at such rate or rates and computed in such manner as he may prescribe. Such war-savings certificate shall be in such form or forms and

division of loans and currency, Washington, D. C., provided the form of demand for payment, appearing on the back hereof, shall be properly signed by the registered owner, in the presence of, and duly certified by, a United States Postmaster, an executive officer of an incorporated bank or trust company, or any other person duly designated by the Secretary of the Treasury for the purpose, in case of the death or disability of the registered owner, a special form of demand for payment prescribed by the Secretary of Treasury must be executed.

This certificate is not valid unless the owner's name and address and the date of issue are duly inscribed hereon by an authorized agent at the time of issue thereof. This certificate is not transferable, and is payable only to the registered owner except in case of death or disability of such owner, and in such case is payable as provided in regulations prescribed by the Secretary of the Treasury.

Provision has been made for the registration of this certificate and the owner's name and address on the books of the Treasury Department, Washington.

Washington, September 30, 1922.

Not transferable.

A. W. MELLON,
Secretary of Treasury.

(Back of Certificate)

Table Showing How the Within $100 Treasury Savings Certificate Increases in Value During Succeessive Months Following Issue

$100 Certificate

	1st year	2nd year	3rd year	4th year	5th year
1st day of 1st month	$82.00	$84.40	$86.80	$89.20	$91.60

(Table of Cash Value According to Date)

At maturity, 5 years from date of issue $100

Example: The purchase price of this $100 Treasury Savings Certificate is $82.00. If purchased on December 4, 1922, its value on May 12, 1923 (first

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subject to such terms and conditions, and may have such provisions for payment thereof before maturity, as the Secretary of the Treasury may prescribe. Each war-savings certificate so issued shall be payable at such time, not exceeding five years from the date of its issue, and may be redeemable before maturity, upon such terms and conditions as the Secretary of the Treasury may prescribe. The sum of such war-savings certificates outstanding shall not at any one time exceed in the aggregate $4,000,000,000. It shall not be lawful for any one person at any one time to hold war-savings certificates of any one series to an aggregate amount exceeding $5,000. The Secretary of the Treasury may under such regulations and upon such terms and conditions as he may prescribe, issue, or cause to be issued, stamps to evidence payments for or on account of such certificates (Sept. 24, 1917, c. 56, § 6, 40 Stat. 291; Sept. 24, 1918, c. 176, § 2, 40 Stat. 966; Nov. 23, 1921, c. 136, § 1402, 42 Stat. 321)."

The petition further alleges that "* * * the above-named defendant [i. e., the United States] did make and pro-

year sixth month), would be $83.00; its value on September 10, 1924, (second year tenth month), would be $86.20; and its value on December 4, 1927, maturity date, would be $100.

(Seal of
Post Office
Stamp
Issuing office)

Form of Demand for Payment

The undersigned is the owner of the within certificate and hereby makes demand for the payment thereof. The undersigned does not hold Treasury Savings Certificates of any one series to an aggregate amount exceeding $5,000, maturity value.

(Signature of Owner)

No. and Street---------------------------------
Town or city---------------------------------
State---------------------------------

Date

Personally appeared before me, the owner above named, known or proved to me to be the owner of this certificate, and signed the above demand for payment. Acknowledging the same to be his free act and deed.

Witness my hand and official designation.

(Signature of Attesting Officer)

(Official Designation)

Seal or Post Office
Stamp

Dated at---------------------------------, ------------------ 19----

This demand must be properly signed by the owner in the presence of, and duly certified by, a United States Postmaster, an executive officer of an incorporated bank or trust company, or other person duly designated by the Secretary of the Treasury for the purpose.

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mulgate on August 1, 1922, a rule of that department in regard to the registration and payment of said Treasury certificates as follows: * * *." Here the petition quotes Regulation XI in regard to the issuing of the certificates.

The petitioner then avers in the fourteenth paragraph of her petition that—

"* * * said rules and regulations, in so far as they purport to apply to these Treasury savings certificates under the facts therein stated, are illegal and void and of no effect and unconstitutional and beyond the power of the Secretary of the Treasury Department to make or promulgate in this, that said Treasury savings certificates having been retained by said James Vinson Wiggins during his entire lifetime and never having been delivered to said persons whose names are contained in such certificates, either directly or constructively, that said certificates and the proceeds thereof are the property of the estate of James Vinson Wiggins and that the Treasury Department would not have the power or authority to make rules and regulations which would have the effect of passing the title to property in the State of Texas, and that the question as to the title and ownership of said certificates and the proceeds thereof, as herein stated, is controlled by the laws of the State of Texas and not by the rules and regulations of the Treasury Department."

A list of the beneficiaries under these certificates is contained in paragraph 4 of the petition and the form of the certificate is contained in paragraph 5.

At the outset it is well to note that this is a suit on a contract between the plaintiff's testator and the United States. This contract was entered into by the Secretary of the Treasury as the representative of the defendant under authority of the act of Congress and in conformity to the regulations made and promulgated by him before the execution of the contract, under authority given him by said statute, and the statute was passed in the exercise of the constitutional powers of Congress to borrow money. The contract having been entered into in conformity to the act and under the authorized regulations previously made and promulgated, both the act and the regulations must be read into the contract, became a part thereof at the time the contract was executed, and limit and fix the rights of the plaintiff's testator as the purchaser of the certificates.

Under these certificates as issued to the plaintiff's testator he was allowed to name a third person as beneficiary, and such persons were named in each certificate, to whom the money represented by the certificate should be paid, under certain conditions.

As shown by the petition the Secretary refused to pay the certificates to the plaintiff because under the language of the certificates and their terms, and the regulations and contract, the money was payable to the beneficiaries named.

The plaintiff contends, as stated in the petition and elaborated in the brief, that the act of Congress is unconstitutional and the regulations of the Secretary of the Treasury passed in conformity thereto are void, for the reason that it is in effect an attempt to regulate and control the devolution of property as fixed by the statutes of the State of Texas. This is not a case where Congress has attempted after the fact to do something, as the act and the regulations were in effect prior to the execution of the contract. They were not passed after the fact. And the case is simply one of contract, a part of which contract is the act of Congress previously passed and the regulations of the Secretary of the Treasury promulgated in conformity thereto.

It is not contended here, and it can not be successfully contended, that the regulations of the Secretary of the Treasury are inconsistent with the act or in violation of its purposes. If this be true, then they became law within the limits of their provisions, as much the law as the act itself. *United States* v. *Birdsall*, 233 U. S. 223; *United States* v. *Smull*, 236 U. S. 405, and *Maryland Casualty Co.* v. *United States*, 251 U. S. 342, 349. In the latter the court said:

"It is settled by many recent decisions of this court that a regulation by a department of Government, addressed to and reasonably adapted to the enforcement of an act of Congress, the administration of which is confided to such department, has the force and effect of law if it be not in conflict with express statutory provision."

This is but to express the law as it has existed since the opinion of Chief Justice Marshall in *United States* v. *Maurice*, 2 Brock. 96, 105, to the present time.

This contract was formally, regularly, and legally entered into by the plaintiff's testator and the Secretary, representing the United States. There is and can be no question about its terms and conditions. The plaintiff admits them in her petition, and sets them forth. The Secretary of the Treasury, as will be seen, has been proceeding under the statute, and had comprehensive authority to prescribe the terms and conditions of the payment of these certificates. The act says:

"Each war savings certificate so issued shall be payable * * * upon such terms and conditions as the Secretary of the Treasury may prescribe."

The Secretary prescribed the conditions that are to be found in the contract (paragraph 5 of the petition), and without going into details, they provide that the purchaser could have the certificate made payable either to himself or a beneficiary. He was not required or compelled to make it payable to a beneficiary. If he did so, as in this case, it was provided that the name of the beneficiary would be registered in the Treasury, and that the fund represented by the certificate, the certificate being a mere evidence of debt, should be payable to him upon the death of the purchaser leaving the beneficiary surviving, unless the purchaser during his lifetime recalled the designation or collected the fund represented by the certificate. The testator did not cancel the designation of the beneficiaries and did not collect the fund during his lifetime. He died leaving the beneficiaries surviving him. The Secretary of the Treasury in effect said to plaintiff that under the contract "this money is payable to the beneficiaries and not to you and I refuse to pay it to you." We are of opinion that in so doing he was acting in conformity to the provisions of the contract.

In the light of the foregoing conclusions plaintiff's petition should be dismissed and it is so ordered.

WILLIAMS, *Judge*, and LITTLETON, *Judge*, did not hear and took no part in the decision of this case.

GREEN, *Judge*, and BOOTH, *Chief Justice*, concur.

NEWMAN, SAUNDERS & CO. v. THE UNITED STATES[1]

[No. J-194. Decided December 23, 1929]

On the Proofs

Income tax; transfer of property in exchange for stock; sale by transferee; basis for determining gain or loss; constitutionality; double taxation.—(1) Income tax determined in accordance with sections 203 (b) (4) and 204 (a) (8) of the revenue act of 1924, whereby gain from the sale of certain property by a transferee received in exchange for stock is to be computed as from the time the property was acquired by the transferor, and not from the time of transfer, is not a tax upon capital but a deferred tax upon profits, and one which was, under the Constitution, within the power of Congress to levy.

(2) In such a case the transferee takes the property subject to the impending tax.

(3) The provision in said section 203 (b) (4) in respect to treatment of the transfer as involving no gain or loss, precludes double taxation.

The Reporter's statement of the case:

Mr. Bernhard Knollenberg for the plaintiff. *McLaughlin, Knollenberg & Leisure* were on the brief.

Mr. Ralph C. Williamson, with whom was *Mr. Assistant. Attorney General Herman J. Galloway*, for the defendant. *Mr. E. O. Hanson* was on the brief.

The court made special findings of fact, as follows:

Plaintiff was incorporated under the laws of the State of Louisiana on July 1, 1922. On that date, plaintiff acquired from the partnership of Isidore Newman & Son, and from J. K. Newman and Paul H. Saunders, certain securities and other property solely in exchange for its capital stock. Immediately after the exchange, the transferors were in control of the corporation and the stock received by each transferor was substantially in proportion to his interest in the property prior to the exchange.

The par value and also the fair market value of the capital stock issued by plaintiff for the said securities were the same

[1] Certiorari denied.

as the then fair market value of the securities acquired in exchange for the said stock, namely, $288,140.00.

In 1924, the plaintiff sold the securities so acquired for $408,392.45, being in excess of the value of the stock issued for said securities in the sum of $120,252.45. The plaintiff included this last-named sum in its Federal income tax for 1924 and paid a tax thereon. The Commissioner of Internal Revenue, however, held and determined that in computing the taxable gain to plaintiff through the sale of the above-mentioned securities the basis was the cost of the securities to the parties transferring them to the plaintiff, which cost was $191,309.33, and that the profit on which the plaintiff was taxable was $96,830.67 in excess of the amount returned by plaintiff. Computing the taxable income of plaintiff for 1924 upon this basis resulted in $12,103.84 additional taxes being assessed against plaintiff under the ruling of the commissioner. Upon notice and demand by the collector of internal revenue, the plaintiff on January 9, 1928, paid to the collector the sum of $12,117.59, which included the amount of increased tax on said sale, as specified above, together with interest thereon of $1,744.68. Shortly thereafter the plaintiff filed a claim for a refund of the sum of $13,846.54 out of the total paid as aforesaid. This claim for refund was rejected by the Commissioner of Internal Revenue.

It is agreed by the parties hereto that the determination by the commissioner that an additional tax of $12,103.84 was due from the plaintiff in the manner hereinbefore stated, was in exact accordance with the provisions of section 204 (a) (8) of the revenue act of 1924, and section 204 (a) (8) of the revenue act of 1926, and that if said sections are in violation of the Constitution of the United States, the additional income tax in the amount of $12,103.84 and interest thereon in the amount of $1,742.70 have been illegally collected, and the plaintiff is entitled to a refund of said amount; otherwise the plaintiff is not entitled to any refund.

The court decided that plaintiff was not entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

The plaintiff in this case seeks to recover $13,846.54, being the amount of income tax collected from it in the year 1928,

under section 204 (a) (8) of the revenue act of 1924. The issue in the case is whether this provision of the revenue act is constitutional.

The facts in the case are not in dispute. It appears that plaintiff was incorporated on July 1, 1922, and thereafter was engaged in business as a stock and bond broker and dealer in investment securities. On said date, plaintiff acquired, solely in exchange for its capital stock, certain securities and other property from the partnership of Isidore Newman & Son, and J. K. Newman and Paul H. Saunders, individuals, who are hereinafter referred to as the transferors. The stock received by each transferor was substantially in proportion to his interest in the property exchanged, and immediately thereafter the transferors were in control of the corporation. The par value and the fair market value of the capital stock issued by plaintiff for said securities were the same as the fair market value of the securities acquired, being in each case $288,140. In 1924, plaintiff sold the securities so acquired for $408,392.45. The cost of the securities to the transferors was $191,309.33, and the Commissioner of Internal Revenue held that a taxable gain had been realized by the plaintiff on said sale in the amount of the difference, which was $217,083.12, using the cost of the securities to the transferors as the basis for computing gain, and assessed plaintiff's income tax accordingly. The commissioner's ruling was made under section 204 (a) (8) of the revenue act of 1924 above referred to, which provides as follows:

"SEC. 204. (a) The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that—

* * * * * * *

"(8) If the property (other than stock or securities in a corporation a party to a reorganization) was acquired after December 31, 1920, by a corporation by the issuance of its stock or securities in connection with a transaction described in paragraph (4) of subdivision (b) of section 203 (including, also, cases where part of the consideration for the transfer of such property to the corporation was property or money in addition to such stock or securities), then the

basis shall be the same as it would be in the hands of the transferor, increased in the amount of gain or decreased in the amount of loss recognized to the transferor upon such transfer under the law applicable to the year in which the transfer was made."

It will be observed that the application of the provisions above quoted with reference to the gain on the sale or exchange of property depends on section 203 (b) (4) of the same act, which reads as follows:

"(4) No gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely in exchange for stock or securities in such corporation, and immediately after the exchange such person or persons are in control of the corporation; but in the case of an exchange by two or more persons this paragraph shall apply only if the amount of the stock and securities received by each is substantially in proportion to his interest in the property prior to the exchange."

Section 202 (c) (3) of the act of 1921 contains a provision similar in effect to that contained in the paragraph quoted next above.

In the instant case, the property (securities) was transferred to a corporation by persons "solely in exchange for stock or securities in such corporation, and immediately after the exchange such * * * persons" were "in control of the corporation," and the amount of stock received by each was "substantially in proportion to his interest in the property prior to the exchange."

It will be observed that the original exchange of the securities for stock was made in 1922. The 1924 act was retroactive in its provisions with reference to determining the basis for computing gain or loss on exchange or sale of property, but so far as the exchange of securities for stock is concerned, it is immaterial whether the provisions of the 1921 or 1924 act are applied. The provisions in each are substantially the same and under either act, no gain or loss would be recognized with reference to the exchange, and there would be no tax upon it. The sale of the securities was made in 1924 by the corporation to which they had been transferred and the tax thereon was controlled by section 204 (a) (8) of the act of that year which is quoted above.

Opinion of the Court

Following its provisions, the commissioner held that when the corporation sold the securities, the basis for determining its gain was the same as it would have been in the hands of the transferor; or, in other words, the basis for computing the gain was the original cost to the transferor of the securities exchanged. The statute also provided that this basis should be "increased in the amount of gain or decreased in the amount of loss recognized to the transferor upon such transfer," the transferor in the case at bar being the party who transferred the securities to the corporation in exchange for stock. As both section 202 (c) (3) of the revenue act of 1921, and section 203 (b) (4) of the act of 1924, provided that no gain or loss should be recognized on the kind of transfer under consideration, there was nothing to be added or subtracted from the cost of the securities to the original transferor in arriving at the basis for the determination of gain or loss to the plaintiff upon the sale made by it.

The plaintiff corporation contends that the basis from which gain or loss should be measured is the cost of the securities to it at the time of the exchange, which, as before stated, was $288,140, and that the provision of the act under which the commissioner computed the gain upon its sale of the securities which it had received is unconstitutional.

Three propositions are laid down to support this contention: First, that Congress can not tax, as income from the sale of property, an amount greater than the excess of the selling price over the cost to the party making the sale; second, that the cost to a corporation of property acquired by it in exchange for stock is the value of the stock issued for the property; third, that Congress can not under the circumstances of the present case disregard the corporate entity.

It is argued on behalf of plaintiff that the increase in value which occurred before the securities were exchanged became capital in the hands of plaintiff when it received the stock, and to put a tax upon this gain was a tax upon capital instead of income. We do not think this follows. In one sense all income becomes capital when received, but this does not prevent the Government from laying a tax

upon it. We think the precise question involved in this case has been completely settled by the decisions of the Supreme Court. In *United States* v. *Phellis*, 257 U. S. 156, 171, the Supreme Court said:

"Where, as in this case, the dividend constitutes a distribution of profits accumulated during an extended period and bears a large proportion to the par value of the stock, if an investor happened to buy stock shortly before the dividend, paying a price enhanced by an estimate of the capital plus the surplus of the company, and after distribution of the surplus, with corresponding reduction in the intrinsic and market value of the shares, he were called upon to pay a tax upon the dividend received, it might look in his case like a tax upon his capital. But it is only apparently so. In buying at a price that reflected the accumulated profits, he of course acquired as a part of the valuable rights purchased the prospect of a dividend from the accumulations—bought 'dividend on,' as the phrase goes—and necessarily took subject to the burden of the income tax proper to be assessed against him by reason of the dividend if and when made."

In the case at bar, when the plaintiff acquired the securities involved, it took them subject to the burden of the income tax which might properly be assessed against a corporation receiving securities under the circumstances existing in this case. It is true the facts in the *Phellis case* were quite different from those in the one now before us, but the principle which we have outlined above was elaborated and made clear in *Taft* v. *Bowers*, 278 U. S. 470.

The last-named case involved the taxable gain realized upon the sale of property which had been received as a gift, and the court held that the basis for determining the gain was, under the statute, the same as that in the hands of the donor. It was urged in that case on behalf of the taxpayer, as in this, that the increase in value of the property conveyed while the same was in the hands of the donor was capital and could not be taxed, and that a taxpayer could have no gain until the proceeds of the sale exceeded his cost, but the Supreme Court said:

"* * * By requiring the recipient of the entire increase to pay a part into the public treasury, Congress deprived her of no right and subjected her to no hardship.

She accepted the gift with knowledge of the statute and, as to the property received, voluntarily assumed the position of her donor. When she sold the stock she actually got the original sum invested, plus the entire appreciation; and out of the latter only was she called on to pay the tax demanded.

* * * * * * *

"There is nothing in the Constitution which lends support to the theory that gain actually resulting from the increased value of capital can be treated as taxable income in the hands of the recipient only so far as the increase occurred while he owned the property. And *Irwin* v. *Gavit*, 268 U. S. 161, 167, is to the contrary."

Following the rule laid down in the cases above cited, we hold that the tax involved was not a tax upon capital but a deferred tax upon profits, and one which was within the power of Congress to levy.

The principles that determine adversely the first of plaintiff's objections also dispose of the second proposition presented. The commissioner did not take as the basis for computing gain the value of the stock at the time of the exchange, and his action was correct under the rule hereinabove laid down. For convenience in computing the gain the basis is taken as the cost of the securities received by the corporation to the original transferor, but this is merely another way of saying that the corporation took the securities subject to any tax that might subsequently be levied on all the gain that had accrued from the time that the transferor acquired the securities. We do not think that this ignores the corporate entity. It merely recognizes the fact that in making the exchange the original transferor had simply received another instrument which evidenced the same or at least a corresponding right to the same property. Here again, we find there is nothing unconstitutional in the statute.

It is also urged on behalf of plaintiff that if the rule laid down by the commissioner be followed it will result in double taxation. The contention in effect is that the construction we have given to the provisions of the statute involved do not prevent a tax being imposed upon the original transferor for the gains which had accrued on the property transferred up to the time the exchange was made with the corporation.

Syllabus

But we have already shown that so far as both parties to the exchange are concerned, in a case like the one at bar, no gain or loss is recognized upon the exchange. The rule is simply that in such cases the original transferor does not pay any tax on the gain which has accrued while he held the property, but the tax is deferred to be paid by the corporation receiving the property. It should be observed in this connection that if the situation was such that it would not come under the provisions of section 203 (b) (4), that is, if the parties making the exchange were not immediately thereafter in control of the corporation, or if the stock and securities received by each were not substantially in proportion to his interest in the property exchanged, the rule would be different. In such event, a tax would be assessed against the original transferor upon the gain up to the time of the exchange, and the basis for the tax levied against the corporation upon its sale of the property which it had received would be taken as of the time when the exchange occurred. In neither case would there be any double taxation.

Following the authorities above cited, we hold that the provisions of the statute in question are not unconstitutional. The parties having stipulated that if these provisions are constitutional the tax was properly assessed, it follows that plaintiff's petition must be dismissed, and it is so ordered.

WILLIAMS, *Judge*, and LITTLETON, *Judge*, did not hear and took no part in the decision of this case.

GRAHAM, *Judge*, and BOOTH, *Chief Justice*, concur.

CHICAGO & NORTH WESTERN RAILWAY CO. v. THE UNITED STATES

[No. F-329. Decided December 23, 1929]

On the Proofs

Railroad fares; military agreements; construction of through fares; "selling" and "basing" fares.—The method employed by the accounting officers of the Government in constructing through

fares from Fort Sheridan and Great Lakes, Ill., to California points, via St. Joseph, Mo., by the use of "selling" and "basing" fares, *held* to be authorized by tariffs and military agreements.

The Reporter's statement of the case:

Mr. Lawrence H. Cake for the plaintiff. *Mr. F. W. Clements* was on the briefs.

Mr. Louis R. Mehlinger, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff, a corporation, is a common carrier by railroad, its tariff charges for freight and passenger service being duly published and filed with the Interstate Commerce Commission in accordance with law.

II. In December, 1920, the plaintiff, with other railroad carriers, entered into a certain agreement with the United States on the subject of fares and allowances in connection with the transportation of military traffic, entitled "Joint military arrangement," which was in effect beginning January 1, 1921, and until July 1, 1924.

In December, 1920, the plaintiff, with other railroad carriers, entered into another agreement with the United States entitled "Joint military equalization agreement," which was in effect beginning January 1, 1921, and until July 1, 1924.

The joint military equalization agreement provided, with certain exceptions not here material, that the plaintiff and other carriers parties to certain movements, among which are those hereinafter described, would accept for the transportation of those whose travel was subject to fares reduced by the land-grant laws, the lowest net fares that could be computed from point of origin to destination, to be "derived through deductions account land-grant distance, from the lawful fare or charge from point of origin to destination in effect via a route that is recognized as a usually traveled route for military traffic at time of movement." This application of net fares was termed therein "Equalization,"

and involved the use of fares other than by way of actual travel. The equalization agreement also provided for the use of net fares for movements by special train where such use was not available by regular train owing to "insufficient service."

The joint military arrangement, above referred to, specially provided that the fares applicable thereunder would be for the transportation of designated classes, among whom the passengers hereinafter referred to are included, "the lawful fares as on file with the Interstate Commerce Commission or State commissions, from starting point to destination at time of movement, less lawful land-grant deductions, properly established, less three per cent (3%) allowance," by way of recognized "usually traveled routes for military traffic at time of movement," subject to the joint equalization agreement, and to "observance of the fares authorized herein, regardless of lower combinations, until such fares automatically change with the commercial fares upon which they are based."

III. During 1922, 1923, and until July 1, 1924, the plaintiff, as the initial carrier, received and honored Government transportation requests for the transportation of passengers from Fort Sheridan, Illinois, and Great Lakes, Illinois, to points in California, namely, San Diego, San Pedro, and San Francisco, as stated in Exhibit A to the petition herein. All the said movements were via Kansas City or Omaha, routes authorized in the tariffs of the participating carriers.

IV. For the said service of transportation, from Fort Sheridan and Great Lakes, Illinois, to points in California, there were no specific through fares published from the points of origin to the destinations.

V. The plaintiff's bills were stated at net fares established via Chicago and Kansas City, upon the basis authorized in Chicago & North Western Railway Company Interdivision Passenger Tariff 84-3, I. C. C. 2765, publishing "Basing Fares to Chicago to Be Used in the Construction of Fares via Chicago," such basing fares to Chicago from Fort Sheridan and Great Lakes being added to the fares from Chicago published in Chicago Joint Passenger Tariff 273-W, G. J. Maguire's I. C. C. 114, for the movements

transported in 1922 and 1923, and in Chicago Joint Passenger Tariff 274–W, G. J. Maguire's I. C. C. 326, for the movement handled in 1924. After establishing the commercial fare via Chicago by the use of the said tariffs, the plaintiff deducted the land-grant deductions authorized by law from the proportions accruing to the land-grant route via Chicago and Kansas City, and after determining the net fare upon that basis deducted 3 per cent therefrom under the provisions of Joint Military Arrangement 1, effective January 1, 1921. Chicago Joint Passenger Tariff 273–W, G. J. Maguire's I. C. C. 114, was a reissue of Chicago Joint Passenger Tariff 272–W, G. J. Maguire's I. C. C. 79; and Chicago Joint Passenger Tariff 272–W, G. J. Maguire's I. C. C. 79, was a reissue of Chicago Joint Passenger Tariff 271–W, J. E. Hannegan's I. C. C. 714, referred to in Rule 3, page 2, of C. & N. W. Tariff 84–3, I. C. C. 2765.

VI. Settlements made by the General Accounting Office were at net fares derived from deductions on account of land-grant distance from through fares established via Chicago and St. Joseph, to California points by use of basing fares contained in the following tariffs, supplements thereto, or reissues thereof:

Chicago & North Western Ry. Co. Local Passenger Tariff No. 5, I. C. C. 2747 and 3041.

Chicago & North Western Railway Co. Interdivision Passenger Tariff No. 84–3, I. C. C. No. 2765.

Chicago Joint Passenger Tariff No. 273–W, I. C. C. 114, G. J. Maguire, agent.

Chicago, Burlington & Quincy R. R. Co. Local and Joint Tariff No. 1–P, I. C. C. No. 3617.

The Atchison, Topeka & Santa Fe Ry. Co. Joint Passenger Tariff A–1013, I. C. C. No. 2999.

Trans-Missouri Westbound Joint Passenger Tariff No. 71, I. C. C. No. 112, G. J. Maguire, agent.

Southern Pacific Company Interdivision and Joint Passenger Tariff A G–No. 2, I. C. C. 3155.

VII. For the said service payment has been made on the basis of the net fares established by Chicago and St. Joseph, in accordance with the settlements made by the General Accounting Office, the total amount paid on account of the service being $122,187.36, of which $61,910.23 applied to five movements of more than 125 persons each handled in special

train service, namely, the movements on transportation requests W. Q.-2783985, N-1907249, N-1907861, N-1907499, and N-1907576, and $60,277.13 applied to the remaining eighteen movements of less than 125 persons each handled in regular train service. On the basis of net fares established via Chicago and Kansas City as claimed by the plaintiff, the total amount due would be $124,481.35, a difference of $2,293.99, of which $1,185.53 applies to the five movements handled in special train service, and $1,108.46 applies to the eighteen movements handled in regular train service.

VIII. Western Territory Special Car and Train Tariff 28-5, Maguire's I. C. C. 87, which was in effect from August 1, 1921, to November 30, 1923, inclusive, and Western Territory Special Car and Train Tariff 28-6, Maguire's I. C. C. 323, which was in effect from December 1, 1923, to September 30, 1924, inclusive, provided that for special train movements a minimum of 125 tickets would be required.

IX. Following a discussion of the question involved in this case at an informal conference between representatives of the carriers and the Government held in Washington during September, 1923, a decision of the Interstate Commerce Commission was requested as to the application and use of C. & N. W. Tariff I. C. C. 2765 in the construction of through fares from Fort Sheridan via Chicago, and also whether a fare constructed on combinations of basing fares published in different tariffs constituted a specific basis for constructing through fares from Fort Sheridan to California. Copies of official communications dated September 26, 1923, from the Comptroller General of the United States, and September 29, 1923, from the chairman of the Western Military Bureau, addressed to the Interstate Commerce Commission, and the replies of the Commission to each dated December 18, 1923 (B. T. 3000), are annexed to the agreed statement of facts as Exhibit E, and are made a part of these findings by reference thereto.

The court decided that plaintiff was not entitled to recover.

Booth, *Chief Justice*, delivered the opinion of the court:

The plaintiff, an Illinois corporation, honored Government transportation requests for the transportation of troops of

the United States from Ft. Sheridan and Great Lakes, Illinois, to certain destinations in California. Subsequent to the accomplishment of the requested service, the plaintiff presented its bills upon the alleged basis of through rates, and in accord, it is contended, with the terms of the joint military arrangement and joint military equalization agreement. The General Accounting Office declined to approve the bills for the full amounts claimed, making deductions therefrom on the basis of net through fares constructed as claimed, according to law and in conformity with the two joint agreements just mentioned. The amount deducted totals $2,293.99, and for this amount suit is brought.

The single difference between the parties is whether the net fares applied to the service by the General Accounting Office were constructed in accord with the joint agreements mentioned, and as so constructed were *lower* net fares than those asked for by the plaintiff. There were no specifically established through rates from the point of origin to destinations involved in this case. The applicable fares to be applied under the joint agreements had to be constructed by combination or combinations of existing tariffs, and, as conceded, the Government was entitled to the *lowest net fares* properly constructed, irrespective of the actual route of travel. General exceptions 1 and 2 of the joint military equalization agreement provide in terms as follows:

"If a through fare or a basis for constructing the through fare from point of origin to destination is published and filed in the manner provided by law, the carriers parties hereto will not accept nor equalize commercial or net fares established via routes via which no through fares or basis for constructing through fares are published.

"Net fares derived from commercial fares established by combining published and filed fares which are not authorized to be used in combination, according to the practices of carriers, parties hereto under the rules, regulations, and Fourth Section Relief Orders of the Interstate Commerce Commission, will not be accepted nor equalized by carriers parties hereto."

The plaintiff in the construction of its through fare from point of origin to destination relies upon the Chicago & North Western Interdivision Passenger Tariff 84-3, I. C. C.

2765, which does quote fares from Fort Sheridan and Great Lakes to Chicago and is to be used for basing purposes in the ascertainment of through fares to points in California. Among other things, Tariff 84-3, I. C. C. 2765 expressly provides that it is to be used in connection with Hannegan's Chicago Joint Passenger Tariff 271-W, I. C. C. 714 and 754 or reissues thereof, and the latter tariff, 271-W, provides fare from Chicago to the destination points here involved, via Kansas City. The use of the tariffs mentioned was undoubtedly in accord with the joint agreements involved. The combination of the fare from Fort Sheridan and Great Lakes with the fare from Chicago to destinations was a duly authorized fare in accord with "the lawful fares as on file with the Interstate Commerce Commisison or State Commission, from starting point to destination at the time of movement, less lawful land-grant deductions, properly established, less three per cent (3%) allowance." Of this fact there can be no doubt. The difficulty with the situation is, that the concession of this fact fails to solve the issue, for granting the regularity in every respect of the plaintiff's proceeding, we have yet to consider whether the through net fares applied by the General Accounting Office were not also duly authorized by proper tariffs, applied in accord with the joint agreements, and as constructed were *lower* net fares than the plaintiff's.

As stated in plaintiff's brief, "Were these lower net fares properly constructed under the tariffs cited and in accordance with the express terms of the military agreements?" The General Accounting Office constructed the through fare applied in making the deductions as set forth in Finding VII. In so doing, the combination accomplished was attained by using Chicago & North Western Ry. Co. Local Passenger Tariff No. 5, I. C. C. 2747 and 3041. Tariff No. 5, I. C .C. 2747, is as specified, a local passenger tariff available as to *intrastate* rates. It was duly filed with the Interstate Commerce Commission, and while it contained no provision for its use as a basing fare, the reissue of this tariff on December 1, 1923, No. 5-6, I. C. C. 3041, has the following note on the title-page:

"The rates, fares, and charges shown herein, intrastate between stations in Illinois, are those established in compliance with order of the Interstate Commerce Commission in case No. 11703 and reported in 59 I. C. C. 350."

The effect of the above order was to raise *intrastate* fares to the equal of fares in *interstate* traffic in order to eliminate discrimination. This, we think, aside from additional factors, would render the tariff available in constructing through fares. However, the Local and Joint Passenger Tariff No. 1-P, I. C. C. 3617, Chicago, Burlington and Quincy R. R. Co., provided a fare from Chicago to St. Joseph, which was unmistakably a basing fare. It expressly provided as follows:

"The fare shown herein between the various headline points [*this includes Chicago*] and stations shown on pages 5 to 87, inclusive [*this includes St. Joseph*] are for basing purposes in the construction of through fares via such junctions between stations on the Chicago, Burlington & Quincy R. R., Colorado & Southern Ry., and Quincy, Omaha & Kansas City R. R. named herein and stations on *connecting lines* to or from which joint fares via the same route are not in effect."

This duly authorized fare of $17.03 was combined with Trans-Missouri Westbound Joint Passenger Tariff No. 71, G. J. Maguire's I. C. C. 112, St. Joseph to San Francisco, $63.60. This is a passenger tariff which provides: "Fares to destinations or from points of origin not shown in this tariff will be made by adding the fares shown in this tariff to the fares shown in other tariffs, as lawfully on file with the Interstate Commerce Commission, provided that if the fare so made exceeds the fare to or from a point beyond on the same through line as shown in this tariff, the latter fare will apply. Fares so made will apply via all routes authorized under this tariff from or to contiguous points of origin or destinations." Seemingly, there can be no question that this is tariff authority for using the fare from St. Joseph to San Francisco in connection with other fares, to obtain a through fare. The fare as thus constructed by the defendant totals $81.80, made up by the combination set forth in Finding VII. We are unable to perceive the claimed necessity of an existing basing tariff in the combination used by the defendant

from Great Lakes to Chicago. The two fares used, Chicago to St. Joseph, and St. Joseph to destinations in California, were both *basing* tariffs, and were authorized to be used as factors in ascertaining through rates. It is apparent to us that a passenger seeking transportation from Great Lakes to San Francisco, via St. Joseph, Mo., would pay for the same on the basis of the tariffs quoted above. The station agent would be authorized in examining the available tariffs to so construct a through fare. If the plaintiff's objection to the constructed fare is predicated upon the use of a selling or local fare from Great Lakes, the point of origin, to Chicago, it is manifest from the record that the plaintiff's constructed fare was made up by a combinaion of the basing fare from Great Lakes to Chicago and a *non*basing fare from Chicago to San Francisco. Chicago Joint Passenger Tariff No. 273–W, G. J. Maguire's I. C. C. 114, did not authorize the fare from Chicago to San Francisco to be used as a basing fare in connection with a local or basing fare into Chicago, and the tariffs used by the defendant out of Chicago did this very thing. It tendered its basing fares both as initial and as terminal fares. The facts in the case and the methods employed by the parties in constructing a through fare clearly establish that a through fare may be constructed on the basis of a basing fare without combination with additional basing fares, i. e., that a " selling " fare, not published as a basing fare, may nevertheless, for the purpose of constructing a through fare, be combined with a basing fare where the basing tariff authorizes the combination. The military agreements heretofore referred to obviously precluded the construction of through fares upon *any* basis which might produce a *lower net fare*. The injustice of such an equalization is apparent. If, however, the passenger tariffs, duly published and filed with the Interstate Commerce Commission, disclose a lawful basis for the construction of a through fare from point of origin to destination, the court, it seems to us, must presume, in the absence of positive testimony to the contrary, that the route of travel is an established one, and duly recognized as a usually traveled one for military movements. Tariffs filed with the commission and published by the carriers clearly offer the availability of the routes

covered thereby, and while of course they may not recite in detail every single prohibition as to use, they are available when postively allowing their use as a basis for constructing through fares. In this case we have no proof that the route via St. Joseph is not an authorized one. The letter of the commission holds to the contrary. The plaintiff's petition will be dismissed. It is so ordered.

WILLIAMS, *Judge*, and LITTLETON, *Judge*, did not hear and took no part in the decision of this case.

GREEN, *Judge*, and GRAHAM, *Judge*, concur.

SIMEON M. JOHNSON AND LEWIS S. ROSENTIEL, EXECUTORS OF THE ESTATE OF DAVID I. JOHNSON, DECEASED, v. THE UNITED STATES

[No. H.-213. Decided January 13, 1930]

On the Proofs

Income and profits taxes; invested capital; borrowed money.—Where in a merchandizing business a taxpayer gives his promissory notes for the merchandise purchased by him for resale, the amount represented by the promissory notes is borrowed money and not invested capital within the meaning of section 209 of the war revenue act of 1917.

Same; nominal capital; income-producing factor.—Where the cash invested in a business is not an income-producing factor and is used solely in defraying incidental expenses until receipts of sales come in, the amount so invested is, within the meaning of section 209 of the war revenue act of 1917, nominal capital only.

The Reporter's statement of the case:

Mr. Edgar M. Johnson and *Smith & Moore* for the plaintiffs.

Mr. Lisle A. Smith, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. On or about March 6, 1917, David I. Johnson purchased from Morris F. Westheimer warehouse receipts for whisky

Reporter's Statement of the Case

totaling 11,563 barrels for the sum of $163,640.37. For the whisky so purchased David I. Johnson gave his two promissory notes, dated March 6, 1917, payable to Morris F. Westheimer, with 5% interest, one note being for the sum of $83,640.37 and the other for $80,000. Between March 6, 1917, and December 31, 1917, David I. Johnson purchased from others than Westheimer 1,082 barrels of whisky, for which he paid the sum of $23,989.52, making the total amount of whisky purchased by him for the calendar year 12,645 barrels at a cost of $187,629.89.

II. Between March 6, 1917, and December 31, 1917, David I. Johnson's receipts from sales of whisky purchased from Westheimer amounted to $398,677.12 and his receipts for whisky purchased from others than Westheimer was $23,029.74, making the total receipts $421,706.86.

III. The decedent, David I. Johnson, duly filed within the statutory period, in the office of the collector of internal revenue at Cincinnati, Ohio, his individual income tax return for the calendar year 1917 on Form 1040. The said return for the year ended December 31, 1917, showed a net income of $121,575.64, including "Income from business" of $84,781.03, which was reported as part of the amount of $97,881.03 shown in said return as "Salaries, wages," etc. The return as filed showed a total income and profits tax of $27,596.55, which amount was paid on May 21, 1918, no part of which has since been returned or repaid to or for the account of David I. Johnson or his estate. The tax was computed as shown below:

Total net income before deducting excess-profits taxes		$121, 575. 64
Less: Excess-profits taxes		7, 350. 48
Total net income on which income tax is to be computed		114, 225. 16
Less:		
Dividends	$8, 593. 00	
Personal exemption	2, 000. 00	
		10, 593. 00
Subject to normal tax of 2% under act of Oct. 3, 1917		103, 632. 16
Less: Additional exemption		2, 000. 00
Subject to normal tax of 2% under act of Sept. 8, 1916		101, 632. 16

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Normal tax of 2% on $103,632.16	$2, 072. 64
Additional normal tax of 2% on $101,632.16	2, 032. 64
Surtax	16, 140. 79
Excess-profits tax at rate of 8% on $91,881.03	7, 350. 48
Total taxes	27, 596. 55

In preparing his return, David I. Johnson computed the excess-profits tax on $97,881.03 (which included "Salary" or $13,100.00, and "Income from business" of $84,781.03), after deducting the statutory exemption of $6,000.00, at the rate of 8 per cent, under the provisions of section 209 of the revenue act of 1917.

IV. Some time in August, 1921, a revenue agent made an examination of the returns for 1917 filed by the decedent, David I. Johnson, and determined and reported that the net income of the said David I. Johnson for the calendar year 1917 was $122,237.55, of which $84,724.04 constituted "Income from business," and that the total tax liability on the basis of income as restated was $46,154.01. The tax was computed as shown below:

Total net income before deducting excess-profits taxes		$122, 237. 55
Less: Excess-profits taxes		33, 167. 53
Total net income on which income tax is to be computed		89, 070. 02
Less:		
Dividends	$8, 793. 00	
Personal exemption	2, 000. 00	
		10, 793. 00
Subject to normal tax of 2% under act of Oct. 3, 1917		78, 277. 02
Less: Additional exemption		2, 000. 00
Subject to normal tax of 2% under act of Sept. 8, 1916		76, 277. 02
Normal tax of 2% on $78,277.02		1, 565. 54
Additional normal tax of 2% on $76,277.02		1, 525. 54
Surtax		9, 895. 40
Excess-profits tax, sec. 209	568. 00	
Excess-profits tax, sec. 201	32, 599. 53	
		33, 167. 53
Total taxes		46, 154. 01

The income as determined by the revenue agent, including "Income from business" of $84,724.04 as determined by him, was conceded by the executors of the estate of David I. Johnson to be correct. The revenue agent computed the excess-profits tax on "Income from business" at graduated rates under section 201 of the revenue act of 1917. He computed the excess-profits tax on "Salaries, wages," etc., of $13,100.00, as determined by him, after deducting the statutory exemption of $6,000.00 at 8 per cent, under section 209 of the revenue act of 1917.

V. The Commissioner of Internal Revenue adopted the findings of the revenue agent. Petitioners then applied for assessment under section 210 of the revenue act of 1917 but without abandoning their contention that the tax in question was assessable under section 209 of that act.

On February 5, 1924, Deputy Commissioner of Internal Revenue J. G. Bright notified the executors of the estate of David I. Johnson that claim for the assessment of the profits taxes of the said Johnson for the calendar year 1917 under section 210 of the revenue act of 1917 had been allowed and that there was indicated an additional tax of $8,091.95. Thereafter, assessment of $8,091.95 was made, and on or about February 29, 1924, the petitioners paid to the collector of internal revenue, on demand by him, the sum of $8,621.64 in settlement of the alleged additional tax liability of David I. Johnson for the calendar year 1917 amounting to $8,091.95 and interest, no part of which has ever been returned or refunded to the executors of the estate of David I. Johnson or to any one in behalf of that estate.

VI. Some time in July, 1924, the plaintiffs herein filed with the Commissioner of Internal Revenue a claim for refund of taxes claimed to have been overpaid by David I. Johnson and by the plaintiffs in behalf of his estate, together with interest paid thereon, in the sum of $8,621.64.

VII. On May 29, 1925, J. G. Bright, Deputy Commissioner of Internal Revenue, notified the executors of the estate of David I. Johnson that claim for refund in the sum of $8,621.64, individual income and excess-profits taxes paid by plaintiffs on account of David I. Johnson and in discharge

of his alleged additional tax liability for the calendar year 1917, was rejected.

No action has been taken before Congress or the department, except as set forth in the petition herein; no appeal has been filed in the Board of Tax Appeals, and the amount claimed has never been refunded.

VIII. The tax liability of the above-named taxpayer computed on the basis of nominal capital classification under section 209 of the 1917 revenue act for the year 1917 is—

Total net income as adjusted		$122, 237. 55
Less: Excess-profits tax, computed at 8% on income from business amounting to $97,824.04 ($84,724.04 plus $13,100.00) less specific exemption of $6,000.00		7, 345. 92
Net income on which tax is computed		114, 891. 63
Less:		
Dividends	$8, 793. 00	
Personal exemption	2, 000. 00	
		10, 793. 00
Amount subject to normal tax at 2% under the act of October 3, 1917		104, 098. 63
Less: Additional exemption		2, 000. 00
Amount subject to normal tax at 2% under the act of September 8, 1916		102, 098. 63
Normal tax at 2% on $104,098.63		2, 081. 97
Normal tax at 2% on $102,098.63		2, 041. 97
Surtax on $114,891.63		16, 320. 74
Excess-profits tax at 8%		7, 345. 92
Tax liability		27, 790. 60
Tax assessed:		
Original assessment	$27, 596. 55	
Additional assessment	8, 091. 95	
		35, 688. 50
Overassessment		7, 897. 90

IX. On March 6. 1917, David I. Johnson invested in his business $28,000 in cash. Aside from this amount and $75.00 received by him in commissions, the entire capital used by David I. Johnson in his business for the year 1917 was borrowed. The $28,000 was not an income-producing factor

in Johnson's business and was used solely in defraying incidental expenses of the business during the month of March until receipts from sales of whisky came in. No part of this money was used in the acquisition of the whisky from Westheimer, from sales of which Johnson's entire "income from business" was derived, nor was it or any part thereof used in a material way in the merchandising of such whisky.

X. David I. Johnson of Cincinnati, Ohio, died March 31, 1919, and in his will named the petitioners herein, Simeon M. Johnson and Lewis S. Rosentiel, as executors of his estate. The said Johnson and Rosentiel duly qualified to act in the capacity of executors of the estate of the deceased and are now acting as such executors.

The court decided that plaintiffs were entitled to recover $7,897.90, with interest.

WILLIAMS, *Judge*, delivered the opinion of the court:

The plaintiff's executors of the estate of David I. Johnson, deceased, sue to recover the sum of $8,621.64, paid to the Commissioner of Internal Revenue February 29, 1924, in settlement of the alleged additional tax liability of David I. Johnson for the calendar year of 1917.

The amount of the net taxable income of the deceased David I. Johnson for the year 1917 is not in dispute. In 1921 it was computed by an agent of the Internal Revenue Bureau to be $122,237.55, of which $84,724.04 constituted "Income from business." Plaintiffs concede these computations are correct.

Plaintiff's claim that the excess-profits tax of said David I. Johnson for the year 1917 should be computed under section 209, of the revenue act of 1917, which imposes a flat rate of 8% upon a trade or business, "having no invested capital or not more than a nominal capital."

The section referred to reads as follows:

"In the case of a trade or business having no invested capital or not more than a nominal capital there shall be levied, assessed, collected, and paid, in addition to the taxes under existing law and under this act, in lieu of the tax imposed by section 201, a tax equivalent to 8 per centum of the net income of such trade or business in excess of the

following deductions: In the case of a domestic corporation $3,000, and in the case of a domestic partnership or a citizen resident of the United States, $6,000; in the case of other trades or business, no deduction."

Invested capital within the meaning of the revenue act of 1917 is defined in section 207 of the act and reads:

"As used in this title 'invested capital' does not include stocks, bonds (other than obligations of the United States), or other assets, the income from which is not subject to the tax imposed by this title nor money or other property borrowed, and means, subject to the above limitations: (b) In the case of an individual, (1) actual cash paid into the trade or business, (2) and the actual cash value of tangible property paid into the trade or business, other than cash. * * *"

Under this definition the $26,250.94 borrowed by Johnson and used in his business can not be considered as invested capital.

In the case of the *Empire Fuel Company* v. *Hays*, 295 Fed. 704, these facts were considered: The Empire Fuel Company purchased from the West Virginia Gas Coal Company certain property and engaged in the business of mining and selling coal. The purchase price was $125,000, payment therefor being made with $41,000 in cash, which the buying company had borrowed; the remainder of the purchase price, $84,000, being paid by the promissory notes of the Empire Fuel Company. In passing upon the question as to whether the purchase price should be considered as invested capital, the court said:

"The statute excludes borrowed money from computation as invested capital, and therefore a corporation whose capital is all borrowed has no invested capital and must be taxed under section 209.

"These are clear-cut, definitive, and decisive words of the statute, and are subject to no doubt or ambiguity. Therefore it must follow that the Empire Fuel Company, if all of its money was borrowed, must be taxed under section 209. * * * To ask a court to withhold the operation of section 209, taken in connection with the excluding limitation of section 207, would be to ask the court not to interpret the statute, but to change the policy of the statute and to override it."

In this case the court made no distinction between money borrowed and invested in business, and a business, or assets of a business, procured by the promissory note of the purchaser. The Treasury Department concurred in this decision. See S. M. 2012, C. B. 111-2, page 334.

In *Cartier & Holland Lumber Co.* v. *Doyle*, 269 Fed. 647, the Court of Appeals for the Sixth Circuit held that taxpayer was entitled to the benefits of section 209 of the revenue act of 1917 where it operated on borrowed capital. See, also, the opinion of the court in the same case reported in 287 Fed. 1021.

In *De Laski & Thropp Circular Woven Tire Co.* v. *Iredell*, 268 Fed. 377, affirmed 290 Fed. 955, the court held that property which could not be included in invested capital should not be considered in determining whether the taxpayer was entitled to the benefits of section 209. See, also, *Porter & Sons* v. *Lederer*, 267 Fed. 739.

In S. M. 1943, Cumulative Bulletin 111-2, page 8, the Solicitor of Internal Revenue held that "where the capital of a trade or business is exclusively borrowed money, or where the capital employed is nominal in amount, the taxpayer is entitled to have its tax computed under section 209."

Under the rule laid down in these cases, the $163,640.37, the purchase price of the whisky bought by Johnson from Westheimer, for which he gave his notes, must be excluded in computing the invested capital in Johnson's business. Eliminating these items, the only invested capital used by him in his business for the year 1917 was the $28,000 cash which he paid into his business in March.

Since Johnson did use in his business during the year 1917 the invested capital stated, to be entitled to the benefit of section 209 it must be on the theory that such invested capital was not more than a nominal capital.

Article 72 of the Treasury Regulations, No. 41, provides that capital shall be held to be nominal—

"If the employment of such capital is necessitated by delay and irregularity in the receipts of fees, etc., or if such capital is wholly or mainly used as a fund from which to

advance salaries, wages, etc., or to provide office furniture, accommodations, and equipment, * * *."

Judge Dickinson, of the eastern district of Pennsylvania, in *Park Amusement Co.* v. *McCaughn*, 14 Fed. (2d) 553, 556, said:

"The real criterion (that is, as to whether capital is merely nominal) is in the fact finding of whether money as an income producer played any real and substantial part in producing the income to be taxed. * * *"

Judge Hickenlooper, of the southern district of Ohio, in *Hubbard-Ragsdale & Company* v. *Dean, Collector*, 15 Fed. (2d) 410, 411, in speaking of the definition of nominal capital given by the cases, said:

"Under the law (referring to section 209) the invested capital was considered as merely nominal, if it was used solely as a fund from which to advance salaries, wages, etc., and to provide office furniture, accommodations, and equipment. Under such circumstances it played no integral part in the actual production of income. It was incidental to the earning power of the corporation, which functioned independently of it."

In the case of *McManus Heryer Brokerage Co.* v. *Crooks, Collector of Internal Revenue*, 28 Fed. (2d) 906, the court found: "that the invested capital used in the business of the company during the year 1917 was not more than $34,572.73." and said:

"The company did use in its business during the year 1917 capital of the amount stated. It can not, therefore, be entitled to the benefit of section 209 as a trade or business having no invested capital. If it is to have the benefit of that section, it must be on the theory that it did not have and use in its business more than a nominal capital."

The court concluded:

"that the plaintiff had only a nominal capital invested in his business and was entitled to be taxed under section 209."

In the case last cited the court found that the plaintiff had $88,000 borrowed money. It said, however:

"That the $88,000 of borrowed money should not be included (in invested capital) is clear from the express provision of section 207 defining the term 'invested capital,'

which is that that term shall not include 'money or other property borrowed.'"

It would seem from the decisions cited that nominal capital as used in section 209 of the revenue act of 1917 means capital which is not employed primarily as a means of producing the income to be taxed and is not a material factor in the production of such income.

Applying this test to the facts in the instant case, we are of the opinion that the $28,000 invested capital in the business of David I. Johnson for the year 1917 must be considered as nominal. Its use was incidental to the business, and bore no material part in the production of the income sought to be taxed.

The receipts of sales of whisky purchased by Johnson from others than Westheimer were less than the price paid for such whisky. His entire profits for the year were derived from the sales of whisky purchased by him from Morris F. Westheimer, for which he gave notes.

The business in which Johnson was engaged, the purchase and sale of whisky, was one ordinarily and customarily requiring the use of capital for its operation, and while capital in a large amount was in fact used by him, it was not invested capital within the meaning of section 207 of the revenue act of 1917.

His invested capital was not a factor in producing the income sought to be taxed, was used only for incidental purposes in the operation of the business, and under the rule announced in the decisions of the courts above cited was "not more than a nominal capital."

Section 209 of the revenue act of 1917, as before stated, provides that in the case of a trade or business having no invested capital (and, of course, that can only mean invested capital within the meaning of section 207 of the act) or not more than a nominal capital, there shall be levied, assessed, collected, and paid, in addition to the taxes under existing law and under this act, in lieu of the taxes imposed by section 201, a tax equivalent to eight per cent of the net income.

In the opinion of the court the facts presented in the record bring this case within the provisions of section 209.

The plaintiffs are entitled to the relief asked for in the petition. Judgment should be awarded in favor of the plaintiffs. It is so ordered.

LITTLETON, *Judge;* GREEN, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

S. SNYDER CORPORATION v. THE UNITED STATES

[No. E-286. Decided January 13, 1930]

On the Proofs

Sale of surplus supplies; as is, where is; inspection; implied warranty.—Where under the terms of sale by the Government of surplus supplies by auction, contained in an advertising catalogue, the property is sold by lot, "'as is' and 'where is,' without warranty or guaranty as to quality, character, condition, size, weight or kind," prospective bidders are expressly offered an opportunity to examine the property on sale, and failure to inspect "will not be considered as ground for any claim for adjustment or rescission," there is no implied warranty that the description given in the catalogue is correct, and the successful bidder can not maintain suit for breach of implied warranty because the property received does not fully answer to the description given.

Same; caveat emptor.—Under the circumstances recited and where the Government has not manufactured the articles sold, the maxim of caveat emptor applies.

The Reporter's statement of the case:

Messrs. James L. Fort, Jerome Wilzin, and *O. H. B. Bloodworth, jr.*, for the plaintiff.

Mr. Ralph C. Williamson, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff was, during all of the times hereinafter mentioned, a New York corporation with principal office and business at Rochester, and was engaged in buying and selling scrap metals.

II. September 21, 1922, the United States, through its duly authorized officers and representatives of the War Department, offered for sale by auction at the Morgan Ordnance Reserve Depot, South Amboy, N. J., factory equipment consisting of electrical supplies, steel, iron, brass, bronze, lead, webbing, etc., also a lot of shells listed in a catalogue as item 97, as follows:

"46,212 steel shells, 6-inch, MK II (empty). Each shell weighs 70.22 pounds; copper band, 2.67 pounds; copper base cover, 0.67 pound; lead disc, 0.3437 pound; total of shells 3,245,007 pounds; total of copper, 154,348 pounds; total of lead, 15,883 pounds; total weight, 3,415,238 pounds."

III. By order of the Philadelphia District Ordnance Salvage Board, U. S. Army, there was sent out to all known dealers prior to the date of sale a catalogue of the property to be sold on the date mentioned. This catalogue was compiled by Samuel T. Freeman & Company, auctioneers, Philadelphia, Pennsylvania, and on the front cover thereof appeared the following:

"Public Auction Sale

"Factory equipment, electrical supplies, steel, iron, brass, bronze, lead, webbing, office furniture, etc., Philadelphia District U. S. Army Ord. Dept. Salvage Board, at Morgan Ordnance Reserve Depot, South Amboy, N. J., under the management of Samuel T. Freeman & Co., auctioneers, Philadelphia, Pa."

On the inside of the cover of catalogue appeared the following statement:

"Catalogue compiled by Samuel T. Freeman & Co., Philadelphia."

The second page of the catalogue contained this statement:

"Public auction sale. Government surplus material. By order of the Philadelphia District Ordnance Salvage Board. Samuel T. Freeman & Co., auctioneers, Philadelphia, Pa."

The catalogue then proceeded to give a description of the property to be sold and the terms of sale, among which were the following provisions:

"The depots will be open for examination and inspection from Friday, September 15th, to the date of sale, excepting Sundays.

* * * * * * *

"This catalogue has been made and checked from Government records, and the descriptions, weights, counts, and measures are as accurate as can be obtained; however, no guaranty will be made as to the correct description or full delivery of the specified weight, count, or measure on any lot.

* * * * * * *

"In all lots sold by sample the entire lot is on exhibition at the plant, and the samples are shown merely for the convenience of the sale. The entire lot is but a few steps away from the sample. It is the duty of all purchasers to make examination of the lots. The samples selected are fair and true, but no claim will be allowed on account of any difference between the sample and the lot sold."

On page 8 of the catalogue appeared the following:

"Government Terms of Sale

"The following terms of sale are inserted by order of the office of the Director of Sales, Salvage Board Circular No. 218, and Director of Sales Order No. 108.

"All property listed for sale in this catalogue will be open for inspection for a period of one week prior to sale, during which time prospective buyers will have an opportunity to examine such property and failure on the part of any purchaser to inspect any property will not be considered as ground for any claim for adjustment or rescission.

"All property listed in this catalogue for sale at said auction will be sold 'as is' and 'where is,' without warranty or guaranty as to quality, character, condition, size, weight or kind, or that the same is in condition or fit to be used for the purpose for which it was originally intended, and no claims for any allowances upon any of the grounds aforesaid will be considered after the property is knocked down to a bidder by the auctioneer."

Subsequently, and before the date of sale, a supplementary catalogue of the property to be sold at the Morgan Ordnance Reserve Depot, South Amboy, N. J., was published by the auctioneer and placed in the hands of all known dealers of articles listed therein. The supplementary catalogue listed

the same property at the New Jersey depot as was listed in the original catalogue and provided that the articles sold were "to be sold under the same terms and conditions as printed in the catalogue." The original and supplementary catalogues were sent to and received by plaintiff. The plaintiff corporation and its representatives were familiar with all of the provisions of the catalogue two weeks prior to and at the time of the sale.

IV. A representative of plaintiff attended the sale at South Amboy, N. J., on Thursday, September 21, 1922, and bid the sum of $45,251.90 for the lot of shells listed in the catalogue as item 97, described in Finding II, such bid being on the basis of $1.32½ per hundredweight. Plaintiff was the highest and best bidder for said lot of shells and the lot was, by the auctioneer, sold to plaintiff. Subsequently plaintiff paid the full amount of $45,251.90 bid therefor to the Government.

V. On October 11, 1922, a formal contract was entered into by and between the plaintiff corporation and the United States of America, represented by Paul R. Renn, contracting officer, by the terms of which the United States agreed to sell to the S. Snyder Corporation and that corporation agreed to buy Government-owned material consisting of approximately 46,212 shells, having an approximate weight of 3,415,238 pounds, at the rate of $1.32½ per hundredweight, for the total sum of $45,251.90 "AS IS," located at the Morgan Ordnance Reserve Depot, South Amboy, N. J. This contract following plaintiff's bid and the acceptance thereof contained, among others, the following provisions:

"Whereas approximately 46,212 steel shells, 6″ (empty), Mark II, weighing approximately 3,415,238 pounds, known as lot No. 97 in the catalogue of the auctioneers advertising the material for sale, was awarded to the S. Snyder Corporation under the terms and condition set out in said catalogue and supplement thereto and under terms and conditions hereinafter set forth; and

"Whereas it is desired to enter an agreement between the United States and the purchasers covering the terms upon which the said material is sold to the purchaser.

"Now, therefore, in consideration of the mutual covenants herein contained, it is agreed by and between the parties hereto as follows:

* * * * * * *

"'All of the material sold under this contract is sold in the condition existing at the time of the execution of this agreement "AS IS, WHERE IS."

"'It is understood and agreed that the United States does not warrant or guarantee the quantity of said material to be delivered under this contract, and the approximate amount and weights shown herein *are estimated only*, and the United States will not be responsible for any error or deficiency in respect to such estimated quantity and weight.

* * * * * * *

"'ARTICLE IV. It is further understood and agreed that *the United States does not warrant or guarantee the analysis, quantity, quality, size, weight, condition, or suitability* of the said material sold hereunder, nor make any other guaranty or warranty in connection herewith. Under no consideration will a refund or adjustment be allowed after the material has been awarded owing to the same not coming up to the expectation of the purchaser.

"'ARTICLE V. * * *.

"'In the event the actual quantity of steel shells located at the Morgan Ordnance Depot is greater than the quantity estimated to be on hand at this establishment for the purpose of this agreement, the purchaser agrees to accept and pay for all of the said shells available for sale at this establishment at the rate of one dollar thirty-two and one-half cents ($1.32½) per hundredweight "AS IS, WHERE IS."

"'In the event the quantity of shells available for delivery under this agreement at Morgan Ordnance Reserve Depot is less than has been paid for, the United States agrees to reimburse the purchaser at the unit price paid for same by said purchaser.'"

Plaintiff paid for a total weight of 3,415,238 pounds, but it was later found that the weight actually delivered was 3,399,450 pounds, making a shortage on delivery of 15,788 pounds, as a result of which shortage a refund amounting to $209.19, computed at the rate of $1.32½ per hundredweight, was made to plaintiff by the Government.

VI. Plaintiff made no examination or test of the shells, nor any examination of the Government records, nor did it make application to the Government for permission to

examine or test any of the shells, or to examine the Government records relative thereto, prior to the sale. At the time of the sale on September 21, 1922, the fair market value of scrap copper was 13½ cents a pound, the market value of scrap lead was 8 cents a pound, and the market value of scrap steel was $18 a gross ton, f. o. b. shipping point. Subsequent to the sale to plaintiff and the payment by it of the full purchase price, plaintiff selected at random from the lot about ten shells, separated the several metals therein, and found that the shells so tested showed 2.62 pounds of copper per shell. On the basis of this test plaintiff computed the total copper content at 113,193 pounds; the total lead content at 16,371 pounds; and the total steel content at 3,248,800 pounds. This determination of the plaintiff of the metal content of the shells upon the basis of the test made fails to account for 21,086 pounds of the total weight of 3,399,450 pounds delivered.

VII. October 25, 1922, plaintiff wrote the Ordnance Depot, South Amboy, N. J., with reference to the lot of shells purchased, and on October 28, 1922, Major George F. Lemon, commanding the Morgan General Ordnance Depot wrote plaintiff as follows:

"Replying to your letter of the 25th instant, be advised that there has been expressed to you this date two (2) 6″ shells from lot #97 purchased by you. Your attention is invited to the fact that this lot consists of 46,212 shells instead of 15,265 as stated in your letter.

"With reference to weights, etc., you are advised that the only records we have on this matter show that the following are the approximate weights:

Shell, steel	70.22#
Band, copper	2.67#
Base, cover-lead disc Complete copper disc	.67#
Total	73.56#

"It is suggested that absolute weights could be obtained by breaking down one of the shells being shipped to you.

"This office would appreciate it very much if you could advise us as to the approximate date on which you propose to commence operations and if it is proposed to break down the shell at this plant or elsewhere."

Following the receipt of this letter plaintiff broke down one of the shells and on November 17, 1922, plaintiff wrote the Philadelphia District Ordnance Officer, attention Mr. Van Buskirk, Philadelphia, Pa., as follows:

"In reference to Lot #97, consisting of 6″ shells located at Morgan General Ordnance Depot, purchased at the auction on September 21st, would advise that your catalogue states copper band weighs 2.67 and copper base cover 0.67, making a total of 3.34.

"We have, however, trimmed one of these shells and find that both the copper band and the base cover together weigh only 2.62, making a shortage of 0.72 copper in each shell. Kindly advise us as how you arrive at these figures.

"Also kindly advise us if we should put in a claim for the shortage on copper to you or to the Samuel T. Freeman & Company.

"Awaiting your reply, we are,"

On November 24, 1922, plaintiff again wrote the Philadelphia District Ordnance Board, attention Mr. Van Buskirk, at Philadelphia, Pa., as follows:

"We are in receipt of your letter of the 21st, and have trimmed another shell and find that the copper band and base cover together weigh 2.60#, whereas your catalogue calls for weight of copper band 2.67#, copper base cover 0.67#, making a total of 3.34#. As we find only 2.60# there is a difference of 0.74# per shell, or a total difference of 34197#, amounting in money, at the rate of $.13½ per pound, to $4,616.59.

"From this you can readily see that we must look to you for either a refund of this amount or ask you to cancel this contract.

"We agree with you that the Government gives no guaranty on its advertising and if the Government had advertised 2.67# and we only received 2.66#, we would certainly not have come back to you for so small amount, but this case is different.

"We are inclosing you a copy of a letter from Major Lemon, commanding officer at Morgan, wherein he gives us a weight on the base cover lead disc, complete with copper of 0.67#, whereas your catalogue calls for copper base cover 0.67#, lead disc 0.3437#, so that you can see for yourself that somebody made a mistake in the printing of this catalogue.

Opinion of the Court

"In one paragraph of your letter you say that the writer is well aware of the Government way of doing business, and this is just the reason why we are coming back on this shortage, as he is well acquainted with the way your office does business.

"The writer has noticed, when in your office at Mr. Van Buskirk's desk, that before he puts out a circular of any kind, no matter if the material is worth but $3.00 per ton, that he always weighs it to the fraction before advertising, and we always base our figures on the amount of metal the Government advertises.

"We also note that you say in your letter that it is the duty of the purchaser to inspect all material prior to bidding and ascertain for himself the correctness of the information given. Now, you know that no man could go into any arsenal before a sale or auction and trim a shell and weigh the metal contents. In fact, it is hard to get a sample of material after a person has purchased and paid for it. We have just had an experience of this kind on the rifle grenades we purchased, located at Amatol. We purchased and paid for this material and then the commanding officer did not want to give us a sample until we had wired your office to wire him permission to give us a sample.

"We therefore trust that you will look at this matter in the right light and mail us your check for the amount of the refund due us, $4,616.59, or cancel this contract."

The court decided that plaintiff was not entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

By authority of an act of Congress the War Department offered for sale certain surplus material at the Morgan Ordnance Reserve Depot, at South Amboy, N. J., among which was listed and described a lot of empty shells. The sale of these shells was made at public auction September 21, 1922, at which time plaintiff bid upon and purchased 46,212 shells of a total weight of 3,415,238 pounds, such bid being upon the basis of $1.32½ per hundredweight. A formal contract was entered into by the plaintiff and the United States consummating the sale and the full purchase price of $45,251.90 was paid. A refund of $209.19 was made to plaintiff because of shortage in the total weight delivered.

Plaintiff contends that although it purchased the shells with knowledge that the property was being sold by the defendant "as is" and "where is" without warranty or guaranty as to quality, character, condition, size, weight, or kind, there were misrepresentations by the defendant of material facts upon which plaintiff had a right to rely and that, therefore, the disclaimer of warranty by the defendant becomes void and of no effect and that the sale should be governed by the same rule as would prevail had there been no attempted disclaimer.

Plaintiff was in possession of the catalogue at least two weeks prior to the sale and was thoroughly familiar with the contents thereof. This catalogue showed that it was compiled by the auctioneer, Samuel T. Freeman & Co., and contained the statement of the auctioneer that the catalogue had been made and checked from Government records, that the descriptions, weights, counts, and measures were as accurate as could be obtained but that no guaranty would be made as to the correct description or full delivery of the specified weight, count, or measure on any lot. The Government terms of sale, set forth on page 8 of the catalogue, invited inspection and set forth that the property was to be sold "as is" and "where is" without warranty or guaranty of any kind and that failure on the part of any purchaser to inspect would not be considered as ground for any claim for adjustment or rescission. Plaintiff made no application to test or inspect any of the shells offered for sale or to examine the Government records referred to by the auctioneer in the catalogue, which records, the plaintiff states in its brief, were present at the place of sale.

We think the circumstances under which the catalogue, on which the plaintiff relies as a basis of its claim, was prepared required the plaintiff to make an inspection before it purchased the property in order for it to be entitled to maintain successfully the claim here made, and, having failed to do so, it can not, under the Government terms of sale set forth on page 8 of the catalogue and the provisions of the contract of sale of October 11, 1922, hereinbefore set forth, recover from the defendant for a breach of an implied warranty.

The same principle which prevails between individuals should control in the construction and carrying out of contracts between the Government and individuals. *United States* v. *Utah, Nevada & California Stage Co.*, 199 U. S. 414; *Hollerbach* v. *United States*, 233 U. S. 165. The misrepresentations which will vitiate a contract of sale must not only relate to a material matter constituting an inducement to the contract but it must relate to a matter respecting which the complaining party did not possess at hand the means or knowledge, and it must be a representation on which he relied and by which he was actually misled to his injury. This court will not relieve a party from the consequences of his own inattention and carelessness. Where the means or knowledge are at hand and open to inspection, if the purchaser does not avail himself of these means and opportunities he will not be heard to say that he has been deceived by the vendor's misrepresentations. There was here no concealment by the defendant or anyone representing it and, so far as appears, the plaintiff not only had the opportunity to inspect but was invited to do so. The plaintiff states that having had considerable experience dealing with the Government as a purchaser of surplus war materials, it had found the dealings satisfactory; that its experience had been that by relying upon the best figures which the Government was able to offer, it got satisfactory information as to the character and quantity of the goods sold.

There was no concealment and plaintiff is not entitled to favorable consideration when hè complains that he suffered or was misled by overconfidence in the statements in the catalogue. The doctrine of *caveat emptor* applies here. In *Smith* v. *Richards*, 13 Pet. 26, the court pointed out "that the law does not go to the romantic length of giving indemnity against the consequences of indolence and folly or a careless indifference to the ordinary and accessible means of information." In *Barnard* v. *Kellogg*, 10 Wall. 383, 388, the court stated—

"No principle of the common law has been better established, or more often affirmed, both in this country and in England, than that in sales of personal property, in the absence of express warranty, where the buyer has an oppor-

Opinion of the Court

tunity to inspect the commodity, and the seller is guilty of no fraud, and is neither the manufacturer nor grower of the article he sells, the maxim of *caveat emptor* applies."

It appears that in compiling the catalogue in which the property in question was listed, Samuel T. Freeman & Co., the auctioneer, misinterpreted the Government records with reference to the weight of the base cover lead disc, complete with copper. Plaintiff's claim is not predicated entirely upon this discrepancy. It does not appear that the defendant manufactured these shells or that it had any knowledge of the copper content other than that shown in the catalogue, with the exception of the discrepancy between the Government records and the statement in the catalogue, as shown in the letter of Major George F. Lemon to plaintiff on October 28, 1922, set forth in Finding VII, but in the catalogue these weights were stated to be approximate and prospective bidders were cautioned to examine and inspect and they were put upon notice that the property would be sold " as is " and " where is " without warranty or guaranty as to quantity, character, condition, size, weight, or kind, and these terms were carried, even with greater force, into the contract of sale executed by the plaintiff and the defendant on October 11, 1922. In *Triad Corporation* v. *United States*, 63 C. Cls. 151, the court, at page 156, said:

" The plaintiff was thus notified before the sale that if it bid and purchased the lot of material it could not claim any allowance on account of deficiency in quality, character, or kind of material sold and delivered.

" The plaintiff did not take advantage of its right to inspect, but bought the lot without inspecting it.

" Under the terms of the catalogue it is difficult to perceive how the Government could have given purchasers more specific warning than it did, that they bought at their risk what material it had and was offering for sale; that if a purchaser wished to protect himself he could do so by inspection, full opportunities for which were offered, and that if he failed to inspect and received something other than what he thought he was buying he could have no redress and could not claim allowances by reason thereof. More than that, he was distinctly told that failure to inspect would not be considered as a ground for adjustment. If plaintiff neglected to embrace the opportunity offered it to inspect and purchased the property without doing so, with notice that it

bought at its own risk, it created by its own negligence the situation from which it now seeks relief."

In this case the shells in question were sold as one lot. The claim here made by plaintiff is inconsistent with the contract of October 22, 1922, which the parties chose to make for themselves. It introduces a new element into the contract which it seems clear the parties intended it should not contain. They contracted on the basis of *caveat emptor*, which they had a right to do, and by the terms of the contract the law placed upon the buyer the risk of the purchase and relieved the seller from liability as to the result of any analysis of the metal content of the shells. The shells were not sold as separate shells nor the metal content of the shells sold as such. The formal contract between the parties set forth the total number of shells and the total weight thereof at $1.32½ per hundredweight. In *Lipshitz & Cohen* v. *United States*, 269 U. S. 90, the court quoted from the opinion of the lower court as follows:

"Since the Government is not in the business of buying and selling and its agents are authorized only to offer for sale such material as has been condemned as obsolete or useless, taking the language of this offer and acceptance I am of opinion that the contract must be construed as one offering to sell an approximate quantity of such cast iron, brass [cast and forged steel, bronze, armor steel] or lead, and as one offering to sell all of the materials of these descriptions which were on hand at the various points named, the intention being not to make a sale by the pound or ton, but to make an entire sale of specific lots of obsolete material, whether more or less than the weight, and to include all thereof. * * * I am satisfied that they [plaintiffs] can not claim that this contract, worded as it was, has been broken because it turned out that there was less, even greatly less, of some of the materials described as on hand than the description would have led the purchaser to suppose. It is not made to appear that the United States failed or refused to deliver any of the material that was actually at the forts named at the time the contract was made."

The court then stated:

"We approve this construction of the agreement. Applicable principles of law were announced by Mr. Justice Bradley, speaking for the court in *Brawley* v. *United States*, 96 U. S. 168, 171. The negotiations had reference to specific

lots. The naming of quantities can not be regarded as in the nature of a warranty, but merely as an estimate of the probable amounts in reference to which good faith only could be required of the party making it."

We are of the opinion for the reasons hereinbefore set forth that the plaintiff is not entitled to recover. However, in any event, plaintiff could not recover the amount claimed, for, as is shown in Finding VII, the combined weight of the base cover, including the lead disc, was 0.67 pound. The lead disc weighed 0.3437 pound, which would indicate the copper and base cover to be 0.3263 pound. In other respects the description given in the letter of Major George F. Lemon, October 28, 1922, coincides with the description given in the catalogue. The inclusion of the lead disc, weighing 0.3437 pound, in the weight of the base cover, computed upon the number of shells, makes a total weight of 15,883.06 pounds, so that it is clear that the plaintiff, if it could be said to have been misled, was misled only as to the inclusion of the weight of the lead disc, totaling 15,883.06 pounds, in the weight of the copper base cover. This at 13½ cents a pound amounts to $2,144.21. Deducting from this the refund of $209.19 made by the defendant leaves $1,035.02, which would, in any event, be the full measure of recovery.

It appears further that the total weight delivered to plaintiff was 3,399,450 pounds. Plaintiff claims that it realized from the shells 113,193 pounds of copper, 16,371 pounds of lead, and 2,248,800 pounds of steel. This fails to account for 21,086 pounds of the total weight delivered. It is just as reasonable to assume that this difference was part copper as that it was lead or steel, and, since plaintiff received it, if it were entitled to recover at all, it must definitely prove the actual content of the total amount. Plaintiff in its letter of November 17, 1922, appearing in Finding VII, set forth that upon that analysis each shell contained 2.67 pounds of copper, which would make a total of 131,075.44 pounds.

The court is of the opinion that the plaintiff is not entitled to recover. The petition must, therefore, be dismissed, and it is so ordered.

WILLIAMS, *Judge;* GREEN, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

Reporter's Statement of the Case

ALBERT KINGSBURY v. THE UNITED STATES

[No. F–3. Decided January 13, 1930]

On the Proofs

Contract; shipbuilding; subcontractor; excessive profit; price-reduction agreement; protest; duress.—Where a subcontractor on a shipbuilding cost-plus contract entered into a price-reduction agreement with the Government whereby he was to refund as excessive profit a part of the purchase price paid for machinery furnished by him and he made such agreement and refund stating it to be under protest, the protest, in the absence of duress, created no right, and the threat of "delayed payments, unpleasant controversy, and annoying, expensive interference with the normal conduct of [his] business," in case of refusal to enter the agreement or make the refund, did not constitute duress.

Same; authority of compensation board; tort.—Where under the circumstances recited the demand for reduction in price was made by a regularly appointed compensation board acting under a statute which provided that "no purchase of structural steel, ship plates, or machinery shall be made at a price in excess of a reasonable profit above the actual cost of manufacture," the action of the board was either binding upon the subcontractor, who had knowledge of the statute when he furnished the machinery, or its action was tortious, and the subcontractor is without a remedy.

The Reporter's statement of the case:

Mr. Alex M. Hamburg for the plaintiff.

Mr. Percy M. Cox, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff is a citizen of the United States and a resident of Greenwich, Connecticut.

II. Prior to and during the period of the World War the Navy Department of the United States contracted with the Bethlehem Shipbuilding Corporation, William Cramp & Sons, the Fore River Shipbuilding Company, the Union Iron Works, the Newport News Shipbuilding & Dry Dock Company, and other private shipbuilders, for the construc-

tion of a large number of destroyers and cruisers on a cost-plus basis. The contracts entered into provided, among other things, that:

"The contractor shall use every endeavor to obtain the materials, machinery, equipment, appurtenances, supplies, etc., under this contract at the lowest possible prices, and shall in no case pay higher prices than required by the existing market conditions nor higher prices than are or would be paid for similar materials, etc., purchased at the same time and under like circumstances and conditions for other work in progress in the yard. Specifications and guaranties of all materials, machinery, and equipment, and the agreements under which such are purchased shall be subject to the approval of the department, and orders, prices, and awards shall be subject to the approval of the compensation board. * * *

"For the determination of the actual cost as defined above, a 'compensation board' composed of not more than six nor less than three officers of the Navy shall be appointed by the Secretary of the Navy. This board shall ascertain, estimate, and determine the actual cost in accordance with the * * * clause hereof, and shall determine the proper proportions and reasonable allowances referred to therein, and the decision of said board or a majority thereof shall be binding on both parties to the contract, subject to the approval of the department. Whenever possible it will lay down in advance the methods to be followed in estimating and determining the actual cost, and where this can not be done it will act within three months of the date of the receipt thereof on any claim submitted by the contractor. It will determine the methods to be followed by the contractor in preparing bills and by the inspectors in certifying to them, and will determine the items which must be referred for its decision."

III. Between May 1, 1917, and October 1, 1918, the plaintiff received a number of purchase orders from several shipbuilding companies engaged in the building of vessels for the Navy Department, for certain thrust bearings and parts patented by the plaintiff. Pursuant to the terms of the said purchase orders and contracts which were entered into directly with the shipbuilders, the plaintiff furnished the materials ordered at the prices stipulated in the purchase orders and contracts, and the contractors duly accepted them and paid for them on that basis.

IV. On July 22, 1918, the compensation board requested the plaintiff to submit to it a statement showing the cost of construction of the thrust bearings and parts then being manufactured for naval vessels. On September 27, 1918, the plaintiff replied that he was working on the cost problem and would make a report through the Bethlehem Shipbuilding Corporation. On October 21, 1918, the compensation board of the Navy Department requested the Bureau of Supplies and Accounts to have cost accountants make a thorough investigation of the cost of manufacture of the thrust bearings and parts which were sold to shipbuilders for use on naval vessels. An audit of the plaintiff's books was made in July of 1919 at the direction of the compensation board to determine the cost of manufacture of the articles in question. As a result of that audit the Bureau of Supplies and Accounts reported that they had found that on nineteen representative orders the plaintiff's cost had been $202,619.79 and that he had charged $480,238.00 for the articles covered by those orders. During the period of the investigation, the orders which had been placed with the plaintiff by the several shipbuilding companies were approved by the compensation board as to award but approval as to price was held in suspense pending an adjustment in price.

V. Thereafter the compensation board took up with the plaintiff, both by correspondence and through conferences, the matter of an adjustment of the prices for bearings which had previously been delivered as well as those which were then in the process of manufacture. On February 26, 1920, the compensation board addressed a letter to the plaintiff requesting a concession of prices. Paragraphs 11, 12, and 13 of that communication are as follows:

"11. As pointed out above, your prices involve an excessive or unreasonable profit; and in this connection your attention is invited to the following provision of law covering the use of funds which have been appropriated by Congress for payment for such of this work as was contracted for during 1917 and 1918.

"' * * * no purchase of structural steel, ship plates, or machinery shall be made at a price in excess of a reasonable profit above the actual cost of manufacture.' (39 Stat. 619, 1195.)

"12. No question is raised herein as to the serviceability of your product, its low maintenance cost, and time of delivery. The question is solely one of cost, and the board invites attention to the fact that although discussions in regard to prices have been going on for some time, you have persistently declined to consider any material reduction in your original quotations. Your attitude in regard to investigations of cost has not been that of a firm which is desirous of cooperating with the Government. Your letter of 14 November, 1919, practically declined to permit cost investigations on certain orders.

"13. The compensation board has deemed it advisable to invite your attention to the analysis of your prices and profits as set forth in this letter, and to afford you an opportunity to revise these costs in view of the provisions of law which have been quoted above, before taking such other steps as may be necessary to protect the interests of the Government."

On April 13, 1920, the plaintiff held a conference with the compensation board and on June 7, of that same year, the plaintiff submitted a lengthy statement in which he outlined his position in regard to the prices charged for Kingsbury thrust bearings. He stated that the prices of Kingsbury thrust bearings had been determined long before the Government became a purchaser, and that those prices had been in effect for four years prior to the adoption of the bearings by the United States Navy, and that despite the increased cost of production there had been no increase in the prices charged for the bearings. He contended that the audit made for the compensation board did not truly reflect the plaintiff's business and that the figures which had been obtained from the plaintiff's books had been obtained without authority and illegally, and that the compensation board had no right to make any use of the information which had been so obtained. In paragraph eleven of that letter the plaintiff stated that:

"11. In submitting this explanation we do so with the distinct understanding that we do not in any manner waive our right to insist that the compensation board does not have the authority to fix prices on apparatus furnished to the department by subcontractors; nor the authority to change prices on contracts and orders when once approved by the board; nor the authority to fix or change prices in

any contracts or orders received by Kingsbury which were not on their face subject to approval of the compensation board; nor the authority to withhold approval of prices upon orders where approval of prices has been given for the identical apparatus already manufactured on other orders; nor the right of the board in any event to withhold payment for bearings delivered."

VI. A letter which the compensation board addressed to the plaintiff on June 3, 1920, contained the following paragraph:

"Your remarks regarding the reservation of your rights in connection with this matter are noted. It must be equally understood that the Navy Department reserves its full rights under the circumstances, including that of placing a Navy order for this work if necessary."

VII. On August 9th, the compensation board informed the plaintiff that—

"The compensation board is now compelled to take final action, but will give such consideration as is possible, to such statements as you may desire to make on or before August 12th."

Immediately following the receipt of that telegram, a conference was held at Washington on August 10th. That conference resulted in the entering into of a price-reduction agreement between the plaintiff and the compensation board, whereby the plaintiff agreed to make a price reduction of ten per cent on previously quoted prices covering thrust bearings furnished on completed contracts and a price reduction of seven and one-half per cent on previously quoted prices on bearings to be furnished on uncompleted contracts. Said agreement is as follows:

MEMORANDUM OF AUGUST 30, 1920

Price agreement re Kingsbury thrust bearings between U. S. naval compensation board and Albert Kingsbury, in conference with the board at Washington, D. C., August 10, 1920.

Part I.—Main thrust for destroyers.

Part II.—Main thrust bearings for scout cruisers, battleships, and battle cruisers.

Part III.—Turbine thrust for the above ships.

The concessions made by Albert Kingsbury in this agreement are not to be considered as a precedent in any future negotiations that may arise. They were granted under protest as expressed in the accompanying letter dated September 4, 1920, addressed to the board. Delivery dates and terms of payment are discussed in our letter of September 3rd, addressed to the board.

Part I.—(a) This relates to destroyer thrust bearings that have been manufactured, shipped, and billed in accordance with Mr. Kingsbury's schedule of prices in effect from November 1, 1916, to January 1, 1920.

(b) Mr. Kingsbury had allowed a discount of 10% on purchases of these main thrust bearings in lots of 80 and 90 of one size on an order. He agrees to extend the same discount to orders that were purchased in smaller quantities for the main thrust bearings for the balance of the destroyers of the Bath and Fore River type, numbered between 95 and 347, inclusive. On page four these bearings are listed, together with the discount agreed upon, the total of which is $37,870.00.

(c) No discount has been allowed on spare parts for destroyer thrust bearings, and it is agreed that the board will approve the prices bid by Mr. Kingsbury, in all cases where such approval has thus far been withheld.

(d) Inasmuch as Mr. Kingsbury has already received full payment for most of the main thrusts covered by this part of the agreement and has already invoiced the balance of them, it appears that the concession of $37,870.00 can best be made by direct payment by Mr. Kingsbury, through the board, to the Treasurer of the United States. This settlement will be simplified if the board will approve the prices bid by Mr. Kingsbury for destroyer main thrust bearings in the few cases where such approvals have thus far been withheld and for which Mr. Kingsbury has not yet received full payment.

(e) When the necessary approvals have been made by the board as above suggested, and when full payment has been made to Mr. Kingsbury in accordance therewith, he will send his certified check to the amount of $37,870.00, through the board, payable to the Treasurer of the United States.

Part II.—(a) This relates to main thrust bearings for scout cruisers 9 to 13, battleships 53 and 54, and battle cruisers 1 to 4, now being manufactured or on order, the prices of which have not yet been approved by the board.

(b) It was agreed that the prices to apply to main thrust bearings only would be approved by the board if reduced so that they would average to be 7½% below Mr. Kingsbury's 1920 schedule of prices. It was agreed that the prices of the

spare parts would be approved with no discount from that schedule.

(c) Attached hereto is a blue print, No. 160910, covering Mr. Kingsbury's 1920 schedule of prices for the range of sizes under discussion. The columns on this schedule are numbered at the bottom for easy reference. The method of using them will be clear from the following explanation:

1. The prices in columns 4, 6, and 8 are for bearings with babbitted shoes. In each bearing are two sets of six shoes. The price of a bearing with bronze shoes is obtained by adding to the above price twice the difference between the prices listed in columns 10 and 12. The prices for split collars, style A, in column 16 are determined by adding 5% to the prices in column 12.

2. The bearings for scout cruisers 9 to 13 are of the *leveling plate solid* type, size 30″ standard, but are equipped with bronze shoes. The bearings for battleships 53 and 54 and for battle cruisers 1 to 4 are of the *leveling plate split* type, size 34″ and 45″ standard, respectively, but each is equipped with bronze shoes and two split collars, style A.

(d) On page 5 of this agreement there are listed for each size under discussion unit prices of bearings and spare collars and prices per set of six spare shoes under the following heading:

1. Price bid, with date.
2. Price, 1920 schedule.
3. Price 7½% below 1920 schedule.
4. Proposed equivalent adjusted price.

(e) There are a few discrepancies between the bid prices and the 1920 schedule. In one case the price was bid in 1919. In other cases they were bid early in 1920 before Mr. Kingsbury's 1920 schedule had been corrected and tabulated, but when once bid they were as far as practicable adhered to for sake of consistency.

(f) In accordance with this agreement the prices listed under headings #3 or #4 or their equivalent are understood to be acceptable by the board and will be approved by it. They are conceded by Mr. Kingsbury, who is proceeding with manufacture of the bearings with the necessary dispatch to meet the delivery requirements of the bearing purchasers.

Part III.—(a) This relates to turbine thrust bearings for the destroyers, scout cruisers, battleships, and battle cruisers, covered by Parts I and II.

(b) It was agreed, in all cases where the board has thus far withheld its approval of the prices bid by Mr. Kingsbury for turbine thrust bearings and spares, that the board will

approve the bid prices and direct that payment be made to Mr. Kingsbury in accordance therewith.

ALBERT KINGSBURY, *Engineer*,
By H. A. S. HOWARD.

The agreement was transmitted to the compensation board by a letter from the plaintiff dated September 4, 1920, and that letter is as follows:

ALBERT KINGSBURY, ENGINEER,
OLIVER BUILDING, PITTSBURGH, PA.,
September 4, 1920.

COMPENSATION BOARD,
U. S. Navy Department,
Washington, D. C.
W. L. CAPPS,
Rear Admiral.

Kingsbury thrust-bearing prices

DEAR SIR: Referring to our conference with you on the above subject in your office on August 10th, 1920, an agreement was entered into, under protest on our part, affecting certain concessions in prices. Enclosed is a memorandum dated August 30th, 1920, entitled "Price Agreement re Kingsbury Thrust Bearings," in which we have set forth the terms of the agreement, together with the necessary schedule and summaries for rendering it clear and definite.

It is requested that the board examine the enclosed agreement and when satisfied that it sets forth accurately the understandings reached by our conference, write us formally approving its terms and setting forth its choice of the two alternatives as to prices offered therein.

We wish it thoroughly understood that:

1. These concessions are granted under protest and because as an only alternative we would be subjected to the pressure of the Government's unprecedented war powers, which would result at best in delayed payments, unpleasant controversy, and annoying, expensive interference with the normal conduct and development of our business.

2. We are still firmly convinced that our prices have been entirely justified by the intrinsic value of our product, regardless of the fact that it is still protected by basic patents that give us a monopoly that is recognized by our Constitution as due the inventor.

3. We have purposely refrained from raising our prices during the past four years to the extent to which we have been entitled by virtue of the continued general increase in

wage and material costs and the consequent depreciation of the currency.

4. Our 1920 schedule of prices will yield us very materially less profit on all sizes of bearings than we were making on them prior to our entry into the Great War.

5. The concessions we have granted the board in prices of large bearings for scout cruisers, battleships, and battle cruisers are not justified, and our percentage of profit without these concessions would be very considerably less than those made on main destroyer bearings prior to the signing of the armistice.

Prompt action by the board on the above subject will be greatly appreciated.

Yours very truly,

ALBERT KINGSBURY, *Engineer*,
By H. A. S. HOWARD,
Gen. Manager & Chief Engineer.

hash/eh.
(Enc.)

VIII. On January 12, 1922, the compensation board informed Mr. Kingsbury that it had been authorized by the Navy Department to withhold payments of such sums as might be due him pending his full reimbursement of amounts due the Government under his price agreement of August 10, 1920. On February 18, 1922, the plaintiff forwarded to the compensation board his check drawn to the order of the Paymaster General of the Navy for $35,036.48 and reiterated his protest against making the refund. Mr. Kingsbury was subsequently informed that by reason of a credit adjustment the amount required to be refunded by him would be but $32,528.48 instead of the amount originally claimed. His check for $35,036.48 was returned and on March 6, 1922, Mr. Kingsbury forwarded his corrected check for $32,528.48.

IX. The difference between the total refund of $37,870.00 and $32,528.48 is due to a credit allowed to the plaintiff of $2,833.52 on bearings supplied to the Union Plant of the Bethlehem Steel Corporation at San Francisco, California, and an error in computation.

X. The said check of the plaintiff was duly cashed and covered into the Treasury of the United States.

XI. The plaintiff subsequently communicated with and conferred with officers of the compensation board in an effort to have refunded to him the amount he had paid.

Opinion of the Court

On August 20, 1925, he filed with the Secretary of the Navy a claim for refund and set forth at length his grounds in support of his said claim. On September 16, 1925, the Secretary of the Navy refused the said claim in full.

The court decided that plaintiff was not entitled to recover.

GRAHAM, *Judge*, delivered the opinion of the court:

This case grows out of cost-plus contracts entered into by the Government prior to and during the World War, with certain shipbuilding companies for the construction of a number of destroyers and cruisers, under which, speaking generally, the Government was to furnish the materials which would be purchased by the companies. The plaintiff was a subcontractor. He was the owner and manufacturer of patented thrust bearings and parts, and entered into contracts with several of these shipbuilding companies through the medium of a number of purchase orders received between May 1, 1917, and October 1, 1918, for certain thrust bearings and parts at prices stipulated in the said purchase orders and contracts. The contractors accepted them, and paid for a part of them on that basis. These contracts with the shipbuilders contained provisions quoted in footnote [1] and the

[1] "The contractor shall use every endeavor to obtain the materials, machinery, equipment, appurtenances, supplies, etc., under this contract at the lowest possible prices, and shall in no case pay higher prices than required by the existing market conditions nor higher prices than are or would be paid for similar materials, etc., purchased at the same time and under like circumstances and conditions for other work in progress in the yard. Specifications and guaranties of all materials, machinery, and equipment, and the agreements under which such are purchased shall be subject to the approval of the department, and orders, prices, and awards shall be subject to the approval of the compensation board. * * *

"For the determination of the actual cost as defined above, a 'compensation board' composed of not more than six nor less than three officers of the Navy shall be appointed by the Secretary of the Navy. This board shall ascertain, estimate, and determine the actual cost in accordance with the * * * clause hereof, and shall determine the proper proportions and reasonable allowances referred to therein, and the decision of said board or a majority thereof shall be binding on both parties to the contract, subject to the approval of the department. Whenever possible it will lay down in advance the methods to be followed in estimating and determining the actual cost, and where this can not be done it will act within three months of the date of the receipt thereof on any claim submitted by the contractor. It will determine the methods to be followed by the contractor in preparing bills and by the inspectors in certifying to them, and will determine the items which must be referred for its decision."

plaintiff was visited with knowledge of these provisions, as he was with the provisions of the statutes under which these ships were constructed, attention to which will be hereafter called.

Pursuant to the provisions of the contracts, quoted in footnote, a compensation board was appointed by the Secretary of the Navy for the purpose of ascertaining, estimating, and determining the actual cost and the proper proportions and reasonable allowances as provided in the contracts. This board on July 22, 1918, requested plaintiff to submit a statement showing the cost of thrust bearings and parts then being manufactured for naval vessels. Receiving no report said board requested the Bureau of Supplies and Accounts to make a thorough investigation of the cost of manufacture of the thrust bearings and parts which were sold to shipbuilders for use on naval vessels, and an audit of plaintiff's books was made in July, 1919, to determine the cost of manufacture, and as a result of this audit the bureau reported that they had found that on nineteen representative orders the plaintiff's charge had been more than double what it had cost him to manufacture the articles. The board found that the profit was an excessive and unreasonable one.

The board finally, on August 9, 1920, served the following notice upon the plaintiff:

"The compensation board is now compelled to take final action, but will give such consideration as is possible, to such statements as you may desire to make on or before August 12th."

Immediately following the receipt of this communication, a conference was held at Washington on August 10th, the result of which was that the plaintiff and the representatives of the Government entered into a price-reduction agreement whereby plaintiff agreed to make a price reduction of 10% on previously quoted prices covering thrust bearings furnished on completed contracts, and a price reduction of 7½% on previously quoted prices on bearings to be furnished on uncompleted contracts; and this agreement was formally reduced to writing and executed on the 30th of August, 1920.

Under this agreement the board agreed to approve prices bid by the plaintiff in certain other cases where the board had withheld approval and plaintiff had not been paid, and the plaintiff was to send a certified check for $37,870 to the Treasury in settlement of the reductions agreed upon. As stated, this agreement was formally executed and signed on the 30th of August, 1920. Plaintiff withheld payment of the said sum, claiming that the agreement had been entered into under protest and because to have refused would have delayed payments, created unpleasant controversy, and annoying, expensive interference with the normal conduct and development of his business.

The plaintiff failing to pay, on January 12, 1922, the board informed him that it had been authorized by the Navy Department to withhold payments of such sums as might be due him pending his full reimbursement of amounts due the Government under the contract. Thereupon, on February 18, 1922, the plaintiff forwarded to the board a check, payable to the Paymaster General of the Navy for $35,036.48, with a protest against making the refund. The plaintiff was afterwards informed that by reason of a credit adjustment the amount to be refunded by him would be $32,528.48. His check for $35,036.48 was returned, and on March 6, 1922, plaintiff forwarded his check for $32,528.48.

On August 20, 1925, plaintiff filed with the Secretary of the Navy a claim for refund of this amount, which claim was refused on September 16, 1925, and thereupon, plaintiff, on January 5, 1926, filed suit in this court. He states his claim as follows:

"1. The compensation board, being without authority to fix or modify the terms of the contracts between plaintiff and the shipbuilders, any moneys which it unlawfully collected from plaintiff may be recovered.

"2. The evidence clearly shows that plaintiff made an involuntary payment under protest and duress."

Aside from the provisions of the contract quoted in footnote, the act approved August 29, 1916, 39 Stat. 556, 619, and the act approved March 4, 1917, 39 Stat. 1168, 1195, provided *inter alia* that

"* * * no purchase of structural steel, ship plates, or machinery shall be made at a price in excess of a reasonable profit above the actual cost of manufacture."

The plaintiff is visited with knowledge of this provision of the statutes. The orders were accepted and the goods supplied with this knowledge. The compensation board, as provided by the contracts (see footnote), was regularly appointed by the Secretary of the Navy, with authority not only from the department but under the acts in question to require modifications of the prices in conformity to the requirements of the statutes. If the board had no such authority, and acted without authority, under a mistaken interpretation of the law, in making the contract, such action must be held to have been tortious, and the plaintiff is without remedy. See *United States* v. *Holland-America Lijn*, 254 U. S. 148, 155, and *Wood* v. *United States* 61 C. Cls. 192, certiorari denied, 270 U. S. 650, and *Enid Milling Co.* v. *United States*, 64 C. Cls. 396, 405.

As to the question of protest, the plaintiff's claim is that he paid this money under protest. It is not necessary to discuss at length the question of protest in connection with payment of the money. Under the contract the Government had a right to demand the payment of this money, and the plaintiff under that contract was bound for the payment provided there was no duress, which question will be considered later. The protest could create no right. *Willard, Sutherland & Co.* v. *United States*, 56 C. Cls. 413, affirmed 262 U. S. 489; *Charles Nelson Co.* v. *United States*, 56 C. Cls. 448, affirmed 261 U. S. 17; *Southern Pacific Railroad Co.* v. *United States*, 59 C. Cls. 36; *Northern Pacific Railway* v. *United States*, 59 C. Cls. 122, 132; and *International Contracting Co.* v. *Lamont*, 155 U. S. 303, 310.

As to the second ground, that of duress, it would seem that it was disposed of by a mere recital of the facts. Plaintiff entered into the agreement on August 10. He went into the conference which brought about that agreement with full knowledge of his rights and of the Government's contentions, claims, and intentions. At that conference the terms

of the agreement were settled. Twenty days thereafter, on August 30th, he signed a formal contract embodying the informal agreement of August 10th. He could have refused to sign the contract and stood upon his rights. He had had twenty days in which to consider it. There was nothing in the shape of duress, no compelling power present at the time the contract was executed. But more than this, many months after signing the contract he made payment in conformity to the contract. After the payment was made his check was returned to him on account of a credit adjustment made by the Government, and thereafter he forwarded his second check. There was here no compelling power or authority. Plaintiff simply concluded that it was better to conform to the contract and pay the money rather than have his payments withheld. There was no alternative of helplessness or probable loss. This contract which bound the plaintiff to pay the money involved was deliberately entered into and was legal and binding upon the plaintiff. See *Hartsville Oil Mill* v. *United States*, 60 C. Cls. 712, affirmed 271 U. S. 43. If the plaintiff had intended to rely upon his claimed legal rights he should not have signed the contract. Having signed it, he was bound by it. In the *Hartsville case*, *supra*, Justice Stone in delivering the opinion of the court said:

"But a threat to break a contract does not in itself constitute duress. Before the coercive effect of the threatened action can be inferred, there must be evidence of some probable consequences of it to person or property for which the remedy afforded by the courts is inadequate." Citing *Silliman* v. *United States*, 101 U. S. 465, and other cases.

The only grounds which the plaintiff states as compelling him to sign the contract were "delayed payments, unpleasant controversy, and annoying, expensive interference with the normal conduct and development of [his] business." This, under the decisions, is not duress.

Plaintiff is not entitled to recover, and the petition should be dismissed. It is so ordered.

WILLIAMS, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

Reporter's Statement of the Case

GEORGE E. COGSWELL *v.* THE UNITED STATES

[No. H-488. Decided January 13, 1930.]

On the Proofs

Alien Property Custodian; pay for special services of attorney; failure to adjust or pay out of trust funds; liability of United States.—Plaintiff was employed by the Alien Property Custodian as a special attorney to make an investigation and to assist the Department of Justice in litigation in connection therewith. The compensation was not agreed upon and plaintiff was not carried upon the custodian's payroll as an employee. The fund seized by the custodian as a result of the investigation was eventually returned under a reclamation suit without a decree touching plaintiff's compensation therefrom, or any attempt by the custodian to have the compensation adjusted and paid, the amount thereof being in dispute. At all times the custodian had in his control funds out of which compensation could have been paid. *Held,* (1) that plaintiff was not bound to accept the amount fixed by the custodian if the same was inadequate, (2) that his compensation was not in a fixed statutory amount, as for the regular personnel of the custodian's office, (3) that the custodian was authorized, under Executive order made pursuant to statute, to pay plaintiff reasonable compensation by way of expense, and (4) that plaintiff is entitled to recover from the United States what his services are reasonably worth.

The Reporter's statement of the case:

Mr. Huston Thompson for the plaintiff. *Messrs. Frank S. Bright* and *Lowndes C. Connally* were on the briefs.

Mr. Heber H. Rice, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff, George E. Cogswell, is a citizen of the United States of America, and a resident of the city and State of New York. He graduated at Trinity College, Hartford, Connecticut, in 1897, and from the New York Law School in 1899, and was admitted to practice in the highest courts of the State of New York in June of that year, and has continued a member of recognized standing

at the bar of the Federal courts and the courts of the State of New York.

II. About June 11, 1918, he was employed by the Alien Property Custodian in his legal capacity to investigate and report the financial transactions between one John Simon, a resident of the State of New York, and one Heinrich F. Albert, then a resident of Germany, and to assist in obtaining possession of such funds as the Alien Property Custodian should possess and control. Under this employment the plaintiff continued in the service of the Alien Property Custodian until December 5, 1921, at which time he had a final conference on the Simon case with the Associate General Counsel to the Alien Property Custodian, at his office in Washington.

III. The plaintiff proceeded to conduct an exhaustive investigation into the affairs of the said Simon and Albert. He gave almost his exclusive time and attention to this work, which involved highly technical questions of accountancy and legal knowledge, until October 30, 1918, on which date he filed a report with the Alien Property Custodian which showed Simon owed Albert a large sum of money which was deposited in the American Exchange National Bank in New York City. On November 10, 1918, the Alien Property Custodian approved the report and directed a demand for the money be made on the American Exchange National Bank. After the demand had been made the American Exchange National Bank brought a suit of interpleader against the Alien Property Custodian and Simon, and the plaintiff was requested by the Alien Property Custodian in June, 1919, as special counsel, to assist the Department of Justice in the preparation of the case for trial and afterwards in preparing the appeal to the Circuit Court of Appeals. The district court found in favor of Simon but the case was appealed to the United States Circuit Court of Appeals, which reversed the lower court and rendered a decree that the funds, amounting to over $350,000, be delivered to the Alien Property Custodian. This decision was appealed to the United States Supreme Court, which affirmed the judgment of the Circuit Court of Appeals on December 11, 1922. On March 29, 1923, the funds, amount-

ing to over $350,000, were turned over by the bank to the Alien Property Custodian.

IV. No arrangement was made by the Alien Property Custodian with the plaintiff when he was employed as to the amount of compensation to be paid. In December, 1919, plaintiff submitted a bill for $10,000 for legal services rendered in the investigation and preparation of the report and for other services subsequent to the filing of the report, and up to and including December 19, 1919, and the sum of $137.69 for disbursements. The custodian did not pay the bill, but in a letter to plaintiff indicated his willingness to approve the bill to the extent of $3,000, with disbursements, which amount was declined by the plaintiff. At the time of the letter to plaintiff expressing his willingness to pay him $3,000 there were no funds in the so-called Albert Trust Fund of the Alien Property Custodian.

In 1921 the plaintiff submitted a second bill for services rendered from June 11, 1918, to and including December 5, 1921, in the sum of $13,500 and $180.24 for disbursements; $10,000 being the amount of the first bill and $3,500 being for services rendered as special counsel in the preparation and trial of the interpleader suit in the district court of southern New York, and in the preparation of the appeal to the Circuit Court of Appeals, and for other services rendered in connection with the Simon case.

V. From the date of the termination of his services to January 11, 1927, when payment of his claim was finally refused, plaintiff continuously urged an adjustment of his claim for services and repeatedly demanded its payment. From March 29, 1923, until November 28, 1923, the Alien Property Custodian had in his possession and control more than $350,000 belonging to the Albert Trust Fund. There was, during the time plaintiff was demanding payment for his services, in the possession and control of the Alien Property Custodian a fund varying in amount from time to time, but always running into hundreds of thousands of dollars, accumulated by deducting a certain per cent from moneys returned to various claimants and used to cover the cost of administration of the trusts in custody of the Alien Property Custodian.

The Alien Property Custodian had in his possession and control accumulated interest from the Albert Trust Fund of the sum of $20,204.20, which he returned to Simon July 14, 1925.

VI. On March 28, 1923, Simon brought a reclamation suit in the Federal Court in New York and by decree of November 28, 1923, the fund held by the Alien Property Custodian was ordered returned with accumulated interest to Simon. Subsequently on July 14, 1925, $20,204.20 additional interest were paid over to Simon by the Alien Property Custodian which closed out the Albert Trust Fund.

VII. The services rendered by the plaintiff to the Alien Property Custodian in the investigation and preparation of the report, in assisting the Attorney General as special counsel in the trial of the interpleader suit and in the preparation of the appeal from the decision of the court in that suit to the United States Circuit Court of Appeals; in determination of the citizenship of Simon, and other services rendered by plaintiff, during the period of his employment from June 11, 1918, to and including December 5, 1921, are fairly and reasonably worth $13,500, together with disbursements of $180.24 made by plaintiff.

The court decided that plaintiff was entitled to recover $13,680.24.

WILLIAMS, *Judge*, delivered the opinion of the court:

The facts in this case are stated fully by the court in its findings of fact, and it is not necessary that they be restated at length. Summarized briefly, these facts are:

Plaintiff, a member of the New York bar, was employed by the Alien Property Custodian in 1918, in his capacity as a lawyer, to investigate and report the financial transactions between John Simon, of the State of New York, and one Heinrich F. Albert, a resident of Germany, with a view of enforcing a claim of the United States to a sum of money amounting to about $350,000, deposited in the American Exchange National Bank of New York in the name of Simon, but which the Alien Property Custodian believed, in fact, the property of Albert, an alien enemy.

In pursuance of his employment, plaintiff made an exhaustive investigation of the relations of Simon and Albert, which occupied his time almost exclusively until October 30, 1918, on which date he made a report to the Alien Property Custodian, which report showed that Simon owed a very large sum of money to Albert, and that the funds in the American Exchange National Bank were in fact the property of Albert.

The Alien Property Custodian approved plaintiff's report and made demand on the American Exchange National Bank for the money. The bank brought a suit of interpleader against the Alien Property Custodian and Simon in the district court of New York. Plaintiff, at the request of the Alien Property Custodian, acted as special counsel and assisted the Department of Justice in the preparation for trial, and in the trial, of the case in the district court, and in the Circuit Court of Appeals.

The fact of plaintiff's employment is not disputed, neither is the authority of the Alien Property Custodian to make the employment questioned by the defendant.

The defense raises the issue of the statute of limitations. The court has disposed of that question in its findings of fact, and it is not necessary to discuss it here. His services continued until December 5, 1921, at which time his claim accrued. Suit was instituted November 19, 1927, within six years.

The defendant, while admitting the employment of the plaintiff, and that he rendered the services as stated, contends that he should not recover because:

"Plaintiff was required to look to the Albert trust fund No. 12003 for any compensation that he might receive in this matter and that the Alien Property Custodian was authorized to fix the amount of the same; that plaintiff's refusal to accept the amount fixed while there was such a fund in the hands of the Alien Property Custodian between March 29, 1923, and November 28, 1923, thereafter barred him from compensation from the Government as a matter of right; and that the decree of November 28, 1923, returning the fund and any accretions thereto to Simon, removed from the

Alien Property Custodian any right to disburse same to any other than to Simon."

The argument that the Alien Property Custodian was authorized to fix plaintiff's compensation, and that plaintiff was limited to the amount so fixed, is based on the defendant's construction of section 6 of the trading-with-the-enemy act (40 Stat. 411, chap. 106), and Executive Order 2744 of President Wilson issued October 29, 1917, authorizing and empowering the Alien Property Custodian to exercise certain powers vested in the President by section 6 of the trading-with-the-enemy act.

The pertinent part of section 6 reads:

"The President may further employ in the District of Columbia and elsewhere and fix the compensation of such clerks, attorneys, investigators, accountants, and other employees as he may find necessary for the due administration of the provisions of this act: *Provided*, That such clerks, investigators, accountants, and other employees shall be appointed from lists of eligibles to be supplied by the Civil Service Commission and in accordance with the civil service law."

Executive Order 2744 reads:

"I hereby authorize and empower the Alien Property Custodian to employ and appoint in the manner provided in the trading-with-the-enemy act in the District of Columbia and elsewhere, and to fix the compensation of such clerks, attorneys, investigators, accountants, and other employees as he may find necessary for the due administration of powers conferred on such Alien Property Custodian by law or by any order of the President heretofore or hereafter made. * * *"

It seems quite evident that the appointment, employment, and fixing salaries of the persons enumerated in section 6, of the trading-with-the-enemy act, and Executive Order 2744 apply to those who make up the regular personnel of the Alien Property Custodian's office. They take an oath of office, go upon the regular pay roll of the Government, and are paid from funds carried in appropriation bills. They draw monthly or yearly salaries which the Alien Property Custodian is authorized to fix, and naturally they are limited in their compensation to the salary so fixed.

Plaintiff does not come within that class of employees. He was not on the regular force of the Alien Property Custodian's office. He did not take the oath of office and he drew no salary.

He was employed in his legal capacity, by the Alien Property Custodian, for a particular and important service. The compensation he was to receive was not fixed at the time of his employment. Obviously it could not have been fixed at the time of employment because it could not then be foreseen what the extent and character of his services would be. The Alien Property Custodian believed that a large sum of money in the American Exchange National Bank of New York deposited in the name of John Simon was in fact the property of one Heinrich F. Albert, an alien enemy. Plaintiff was employed to take charge of the matter, go into the facts, reach whatever legal conclusions he thought were correct, "with a view especially of enforcing the claim of the United States to this money." As a result of plaintiff's investigation the Alien Property Custodian instituted proceedings to recover the money and finally, after a long litigation, the money was turned over to him by a decree of the Supreme Court It will be seen from this that plaintiff's services were not those of an ordinary employee of the Alien Property Custodian.

Executive Order 2183, provides:

"(b) The Alien Property Custodian may pay all reasonable proper expenses which may be incurred in or about securing possession or control of money or other property and in or about collecting dividends, interest, and other income therefrom, and in otherwise protecting and administering the same. So far as may be, all such expenses shall be paid out of, and in any event recorded as a charge against, the estate to which such money or other property belongs."

Under the powers here conferred upon the Alien Property Custodian he had authority to employ plaintiff for the particular service rendered in this case, also authority to pay him for such service.

He had the authority to "pay all reasonable proper expenses which may be incurred in or about securing possession of money or other property," etc. The service rendered by

plaintiff was for the purpose of "securing possession and control of money or other property," and largely through the work performed by him the Alien Property Custodian did secure possession and control of a very large sum of money. The only limitation placed upon the Alien Property Custodian for all reasonable and proper expenses in matters of this kind is "that so far as may be, all such expenses shall be paid out of * * * the estate to which such money or property belongs."

It was not the fault of plaintiff that he was not paid during the time the Albert Trust Fund was in the possession and control of the Alien Property Custodian between March 29, 1923, and November, 1923. His claim unadjusted and unpaid was during all that time on file with the Alien Property Custodian. Plaintiff had repeatedly demanded its payment. It was the duty of the Alien Property Custodian, if he could not agree with the plaintiff on the value of his services, to have the matter adjusted by the court before a decree was entered in the reclamation suit, and while the funds from which it is urged plaintiff could only be paid were still in his possession. He permitted these funds to be decreed out of his hands without adjusting plaintiff's claim himself, or having it adjusted by the court on the final disposition of the Albert Trust Fund.

From the termination of plaintiff's services to the Alien Property Custodian, December 5, 1921, up to and until plaintiff filed his suit, November 19, 1927, there was in the possession of the Alien Property Custodian a fund varying from time to time in amount, but always containing several hundred thousand dollars, accumulated by deducting from moneys returned to various claimants a certain per cent to cover costs of administration of trusts held by the Alien Property Custodian. There was ample authority for the payment of plaintiff's bill out of this fund.

On July 14, 1925, there was an amount of accumulated interest, $20,204.20, in the Albert Trust Fund which Alien Property Custodian Miller on that day returned to Simon. Plaintiff could have legally been paid out of that fund.

There was no time after plaintiff submitted his first bill, in December, 1919, for $10,137.69 for services and disburse-

ments to date, up to November 19, 1927, when plaintiff's suit was filed that there were not funds in the possession and control of the Alien Property Custodian, in one or another of the funds above mentioned, out of which he could have properly and legally paid plaintiff.

Defendant admits the Alien Property Custodian could have paid plaintiff out of the Albert Trust Fund, in his hands between March 29, 1923, and November 28, 1923, but insists he could not be paid from any other fund and that he was bound to accept such sum for his services as the Alien Property Custodian might fix, and that "plaintiff's refusal to accept the amount fixed while there was such a fund in the hands of the Alien Property Custodian, thereafter barred him from compensation from the Government, as a matter of right."

In the opinion of the court plaintiff was not required to accept the amount fixed by the Alien Property Custodian for his compensation if the amount so fixed was inadequate, and his refusal to accept the amount fixed did not bar him from compensation from the Government as a matter of right.

The Alien Property Custodian had the authority to employ plaintiff to perform the services rendered; and plaintiff's compensation not having been fixed or agreed upon at the time of his employment, he is entitled to be paid what his services were reasonably worth. The failure and refusal of the Alien Property Custodian to adjust, or cause to be adjusted, plaintiff's claim at such time as he, admittedly, had in his possession and control funds from which it could be paid, and permitting such funds to pass out of his hands with plaintiff's claim unpaid, does not relieve the defendant from liability to compensate plaintiff for his services.

Plaintiff's employment by the Alien Property Custodian, as has been said before, was authorized by law. He rendered the services for which he was employed.

The court in its findings of fact has determined such services to be reasonably worth $13,500, and that plaintiff in connection with the rendering of such services incurred necessary expenses to the amount of $180.24.

In the opinion of the court, therefore, plaintiff is entitled to judgment against the defendant for said amounts, and it is so ordered.

LITTLETON, *Judge;* GREEN, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

POTTS-TURNBULL ADVERTISING CO. v. THE UNITED STATES

[No. F-285. Decided January 13, 1930]

On the Proofs

Income tax; personal-service corporation.—The facts reviewed and *held*, that plaintiff is entitled to classification under section 200 of the revenue act of 1918 as a "personal-service corporation." See opinion.

Same; income from the placement of advertising; discount passed to customer.—Where a "business development" company, as the agent of customers whose business it is seeking to increase, secures a cash discount from publishers for advertising placed with them, and in collecting from the customers the expense of such advertising, which it has paid to the publishers but did not guarantee, gives them the benefit of the discount, the transaction taken by itself does not indicate such a method of producing income as to negative the classification of the development company as a "personal-service corporation."

The Reporter's statement of the case:

Mr. Arnold R. Baar for the plaintiff. *Mr. Wilbur A. Giffen* and *KixMiller, Baar & Hoffman* were on the brief.

Mr. Arthur J. Iles, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. George H. Foster* was on the brief.

The court made special findings of fact, as follows:

I. The taxpayer is a Missouri corporation with its principal offices at 300 Gates Building, Kansas City, Mo. The company was incorporated, at the instance of Henry K. Turnbull, as "The Turnbull Business Development Com-

pany" under a certificate of incorporation dated July 19, 1910, with an authorized capital of $5,000, divided into 500 shares of stock of a par value of $10 each, 250 shares being preferred stock and 250 common stock. The stock was subscribed for as follows:

Henry K. Turnbull	205 shares Preferred	249 shares Common
David M. Proctor		1 "
Fred Wolferman	10 "	
P. S. Harris	10 "	
W. E. Rogers	10 "	

The articles of incorporation recite that at least one-half of the capital stock was actually paid up in lawful money of the United States. The purposes for which the corporation was organized are set forth in articles of incorporation, as follows:

"To transact the business of advertising, promoting, and developing the business of other corporations, partnerships, or individuals for hire, or upon commission, or otherwise, by and through the means of preparing advertising for other corporations, partnerships, or individuals, and of advertising the business, commodities, or other property, real, personal or mixed, of other corporations, partnerships, or individuals in newspapers, books, booklets, prospectuses, magazines, circulars, pamphlets, or other similar literature and advertising medium, * * *."

II. On July 21, 1913, under authority of the Secretary of State of the State of Missouri, the name of the company was changed to "Potts-Turnbull Advertising Company." The capital stock of the corporation was in no way changed, until December 31, 1919, when the secretary of state issued a certificate authorizing the increase of the capital stock of the corporation from $5,000 to $100,000. This change was subsequent to the taxable year under consideration. In the increase under this authority, the par value of the shares was increased from $10 to $100 each and the preferred stock was canceled and exchanged for common stock.

The articles of incorporation do not disclose any preferences given to preferred stock and the stockholders or directors have never, by by-laws or otherwise, made any distinction between the preferred and the common stock except as

to name, and no preferences have ever been given to the preferred stock by any legal action of record taken by the stockholders or directors of the company.

III. The capital stock of the corporation was held by the persons and in the amounts shown below as of the beginning and end of the year 1918.

Stockholders	Number of shares held		
	January to June, incl., 1918	July to November, incl., 1918	December, 1918
H. K. Turnbull, president, treasurer, and general manager	55 com. } 59%	75 com. } 63%	75 com. } 63%
H. K. Turnbull, president, treasurer, and general manager	239 pref. }	239 pref. }	239 pref. }
F. S. Turnbull (wife of H. H. Turnbull)	80 com. 16%	80 com. 16%	100 com. 20%
Otto Barth	50 com. 10%	50 com. 10%	50 com. 10%
B. F. McGuirl, vice president	25 com. 5%	25 com. 5%	25 com. 5%
H. E. Stewart	20 com. 4%	20 com. 4%	
F. E. Whalen, secretary	20 com. 4%		
P. S. Harris	10 pref. 2%	10 pref. 2%	10 pref. 2%
S. T. Balcom (sister of H. K. Turnbull)	1 pref.	1 pref.	1 pref.
	500 shs. 100%	500 shs. 100%	500 shs. 100%

F. S. Turnbull, who was the wife of H. K. Turnbull; S. T. Balcom, who was a sister of H. K. Turnbull; and P. S. Harris were the only stockholders who were not regularly engaged in the business affairs of the taxpayer in the year 1918. The others were regularly and actively engaged in the affairs of the taxpayer without outside interests, and gave their time and efforts exclusively to the business of the taxpayer. The shares of stock standing in the name of F. S. Turnbull were gifts from her husband, H. K. Turnbull. Her stock certificates were never delivered to her, but were held in the possession of Turnbull at all times. The one share standing in the name of S. T. Balcom was given to her by her brother, Turnbull, to qualify her for a directorship, and the 10 shares owned by P. S. Harris were subscribed for by him at the time the corporation was organized.

IV. The gross business of the taxpayer, excluding fees for preparation of advertising, for the year 1918 was $507,-949.51, and a detailed analysis discloses that the business

was produced and handled by the several persons listed below:

W. J. Krebs, H. K. Turnbull, F. E. Whalen, Otto Barth, H. E. Stewart, B. F. McGuirl.

The company paid publishers for advertising placed in publications the sum of $432,132.85. All of these persons served in the capacity known in the taxpayer's business as "account executives" and, with the exception of Krebs, were all stockholders in the corporation. Krebs was employed on a commission basis. In the business conducted by the taxpayer an "account executive" is a person who handles the account of an advertiser; that is, he develops the advertising business of the advertiser with the taxpayer through solicitation, outlines the advertiser's program, determines the publications or advertising medium which should be used by the advertiser, supervises the writing of copy and the insertion of the advertising in the advertising medium.

Krebs was employed by the taxpayer in 1917 or early in 1918, with a view to obtaining a certain account which it was thought he could influence. This account was secured and has been held by the company. In securing this particular account, which was that of a firm by whom Krebs had been employed, Krebs was used merely as a means of contact, the details and technicalities incident to obtaining the account being handled by Turnbull. Krebs had had experience in the advertising department of a manufacturing concern and in selling advertising novelties for another firm, but he had not had experience in an advertising business such as was conducted by the taxpayer. During 1918 the company paid commissions to Krebs, as salary, in the sum of $3,434.18, he being the only employee other than a stockholder to whom a salary in excess of $2,000 was paid. He became a stockholder in 1919.

Turnbull, who owned 239 shares of preferred stock throughout the year, and 55 shares of common stock at the beginning and 75 shares of common at the end of the year, is shown to have produced and handled business to the amount of $266,181.88 of the total of $507,949.51. He was consulted

and acted as adviser on all matters appertaining to obtaining new clients, planning advertising campaigns for advertisers, and originating new ideas for advertisements. He was president, treasurer, and general manager of the taxpayer; initiated the work for himself, the other stockholders, and the employees, and was constantly consulted as to the details of the business. Prior to organizing "The Turnbull Business Development Company" he had been for five years in the advertising department of the Kansas City Journal, and previous to that he had been advertising manager of a dry-goods company.

Barth had formerly been advertising manager for a publication known as the Kansas Farmer and was well versed in farming conditions.

Whalen was experienced in the mail-order selling business.

V. The business of the taxpayer originated from contact between the account executive, or an officer of the corporation, and a representative of the concern from which it was desired to obtain business. Securing an account usually involved a detailed study and analysis by the taxpayer's representative of the advertiser's business, problems of distribution, sales policies, and the selection of the proper advertising mediums in order to present the product of the advertiser in a territory where results could be obtained.

The methods used may be summarized in the following examples: Preceding the acquisition of one of the taxpayer's major accounts and as a result of conferences with the advertiser, Turnbull made a trip to New York and obtained a number of sketches to show his ideas for a change of methods in advertising the product manufactured by the advertiser whose account it was desired to acquire. The advertiser was a manufacturer of soap, who made a laundry soap and a toilet soap. This advertising had not been productive of the best results. Turnbull, through his experience and imagination, devised a series of illustrations which detracted from the labor of using laundry soap and centered attention on the attractive results of cleanliness. These ideas were visualized by a commercial artist and not

only brought the advertising account to the taxpayer but increased sales for the advertiser. In another of the major accounts, which was that of a fur buyer, Turnbull, after a conference with the advertiser, selected illustrations of various fur-bearing animals and constructed an illustrated narrative showing methods of hunting and trapping and the profits that might be made therefrom. These were suggested as a means of more appealing publicity for the advertiser. This account was secured, and the first insertion of an advertisement in a weekly paper through the taxpayer company resulted in about 6,000 inquiries regarding the advertiser's product at a cost of approximately 11 cents each, whereas by the method formerly used by the advertiser the inquiries received had cost from 50 to 60 cents each. In securing the account of a manufacturer of lamps which resulted in one of the taxpayer's larger accounts, the stockholder representative of the taxpayer designed a new and more attractive style of lamp shade for the advertiser and recommended a different sales plan, which resulted in an increase of annual sales from a few hundred thousand dollars to over four million dollars in 1924.

VI. The representatives of the taxpayer corporation handling the account of the advertiser made for his own purpose a memorandum of the advertising to be placed over a particular period by the advertiser. No signed orders from the advertiser were taken by the taxpayer, with the possible exception of instructions contained in letters from advertisers. After securing the account of an advertiser the account executive or officer handling the account made out an "order memo." which was transmitted to the order clerk. A regular printed form was provided for this purpose, but in some instances a memorandum was furnished the order clerk either verbally or in some way other than by the use of the regular form. The order clerk then made out an order to the publisher on a printed form in use by the taxpayer which bore a specific number, directing the insertion of certain copy in one or more certain issues of the publication to which the order was directed. After the orders addressed to the publications were made out it was the practice of the

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company to mail to the advertiser a confirmation of the advertising placed. This confirmation was made out on a printed form designated as "record of advertising order." This record was made and furnished the advertiser by the order clerk as a matter of routine without instruction from the account executive or officers of the company. There was then made out for the use of the taxpayer's accounting department a loose-leaf sheet for each customer which was filed in a special binder designated "record of advertising placed." As the next step in handling the account, a bill made up by the accounting department from the "record of advertising placed" was rendered the customer.

VII. During the year 1918 the following salaries were paid to stockholders:

Otto Barth	$2,600.00
B. F. McGuirl	2,600.00
H. E. Stewart	2,352.50
F. E. Whalen	1,060.00
H. K. Turnbull	12,000.00
	20,612.50

These stockholders were regularly and actively engaged in the affairs of the corporation without outside interests, giving their time to the business and to the affairs of the corporation exclusively. Turnbull was the active and direct manager of the business. He not only brought in more than 50 per cent of the advertising employments but guided the activities of the concern. The other stockholders conferred with him and followed the policies which he directed.

VIII. The following schedule sets forth the income and expense of the taxpayer for the year 1918:

Income

Commission on advertising	$47,967.02	
Art	1,630.81	
Cash discount	11,628.45	
Commission on engraving	1,598.33	
Fees for preparation of advertising	23,516.28	
		$86,340.89

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Expense

Rent, phones, postage, etc	$3,780.34	
Travel	981.85	
Salaries (not including stockholders)	23,093.42	
Discount	11,394.49	
Art	666.58	
Officers' salaries	20,612.50	
Interest	299.28	
Taxes	392.86	
Bad debts	3,136.01	
Depreciation	684.25	
		$65,041.58
Net income		21,299.31

The commissions on advertising placed varied during the year, ranging from 10 per cent to 15 per cent. The commission on engraving was on the basis of 10 per cent of sales. The art department sustained a loss of $668.58 during the year, which should be charged against the total commissions set out for the art department. Included in the amount set out as alleged commissions on advertising is an item of $394.45, representing bad debts recovered. An analysis of the discount account—that is, all discounts taken and allowed by the company during the year—discloses that the company realized a net profit from discounts in the amount of $233.96.

IX. The balance sheets of the corporation as of the beginning and end of 1918 are as follows:

Beginning of year 1918

ASSETS		LIABILITIES	
Cash	$4,997.67	Stock	$5,000.00
Furniture	1,911.11	Undivided surplus	10,000.00
Accounts receivable	31,830.56	Accounts payable	23,739.34
	38,739.34		38,739.34

End of year 1918

ASSETS		LIABILITIES	
Bills receivable	$15,000.00	Stock	$5,000.00
Furniture	2,107.86	Undivided surplus	10,000.00
Accounts receivable	55,717.57	Loans	2,000.00
Stationery and supplies	386.79	Overdraft	11,650.95
		Reserved for taxes	2,162.02
	73,212.22	Accounts payable	42,399.25
			73,212.22

The account "bills receivable," amounting to $15,000, was made up of notes of two advertisers, largely one advertiser, taken during the last days of December and payable during the early part of January, 1919. The notes were taken from advertisers maintaining current accounts running into considerable value. They were not set up on the books of the taxpayer until December 31, 1918, and were paid before the end of January, 1919. The "accounts receivable" represented advertisers' current accounts billed out to advertisers, against which "accounts payable" represented largely amounts due publishers for advertising placed. The amount of $11,650.95, designated "overdraft," was due to the issuance of checks in the last days of December, 1918, for the purpose of paying all possible advertising accounts before the close of the year. This overdraft was almost immediately absorbed after the 1st of January, 1919. The amount of $2,000, designated "loans," represented money borrowed from the bank in November, 1918, and which was repaid in 1919. At the close of business December 31, 1918, and before the distribution to him of his share of earnings of the corporation, the individual account of H. K. Turnbull was overdrawn some $12,000.

X. The company had no contracts with publishers for the purchase of space in bulk, but an individual order was placed with each separate publication for space to be used by each advertiser, and the orders for different advertisers bore no relation to each other. The company made no written contracts with the advertising mediums in which it placed advertising, nor did the advertising mediums make any written contracts with the taxpayer, except in the case of the Curtis Publishing Co. In this case the Curtis Publishing Co., in an agreement dated April 19, 1917, designated "agency terms" agreed to "accept orders from" the taxpayer upon the conditions and terms enumerated therein. When the company was accorded what was known as "agency recognition," which was usually done by way of a letter from the publisher, or verbal information, that fact established the right of the company to what is termed by publishers as "commissions" or "agency differential" and "cash discounts" allowed by the publishers. Space in pub-

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lications was not ordered by the company in advance of bona fide orders received from advertisers and orders were given the publishers in the name of the taxpayer's client. The orders were subject to cancellation at any time. The agency did not acquire any right or title to any advertising space and did not receive the benefit of what are known as "preferred positions," but this benefit ran directly to the advertiser even though the advertiser changed agencies or handled his own advertising direct with the publisher.

XI. In practically all instances the publications or advertising mediums held the taxpayer on account of advertising placed by the taxpayer for its advertisers. In two instances certain notes of the advertiser made payable direct to the publishers were negotiated to the publishers by the taxpayer for advertising placed in the publications by the taxpayer for the advertisers. As a general rule the taxpayer had on hand sufficient funds realized from advertisers who paid accounts in advance or promptly, so as to be able to invariably take advantage of the cash discounts allowed the taxpayer by publishers and to carry the accounts of those advertisers who had not paid their bills to the taxpayer before the taxpayer was required to pay the publisher.

XII. Bills received from publishers for space used by the taxpayer's clients were checked against the "record of advertising placed" maintained by the taxpayer for correctness as to space used, number of insertions, gross rate, and proper allowance of what was termed "advertising agency commissions" or "agency differential" and "cash discount." When the bills were found to be correct they were passed for payment, provided the proper proof of publication had been furnished. With practically no exception the advertisers were allowed the same rate of discount as was taken by the taxpayer. In the case of two or three advertisers, where little or no copy service was required and practically no outlay in traveling expenses, a special and arbitrary cash discount, slightly higher than that taken by the taxpayer, was arranged.

XIII. The Commissioner of Internal Revenue, upon audit of the plaintiff's return for the year 1918, denied to the plaintiff the classification as a personal-service corpor-

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ation, and by reason thereof found a deficiency in income and profits tax of $7,718.63 for said taxable year. The commissioner notified plaintiff of his determination of said deficiency by letter dated August 28, 1924. Whereupon, on October 17, 1924, plaintiff filed an appeal before the Board of Tax Appeals, which said appeal was duly heard and submitted to said board and by it decided on April 14, 1925, approving the determination of the commissioner. After the decision of said board an additional assessment was made against plaintiff in the sum of $7,718.63 for the year 1918, which plaintiff paid to the United States involuntarily and under written protest on March 22, 1926. The income upon which this tax was assessed against the corporation has been taxed as the individual income of the stockholders.

XIV. On April 22, 1926, plaintiff duly filed with the Commissioner of Internal Revenue a claim for refund of $7,718.63 for income and profits taxes claimed to have been theretofore illegally collected from it for the year 1918. Thereafter, on or about the 29th day of May, 1926, plaintiff's claim for refund was rejected by the Commissioner of Internal Revenue.

The court decided that plaintiff was entitled to recover.

BOOTH, *Chief Justice*, delivered the opinion of the court:

The plaintiff is a Missouri corporation, with its principal office at Kansas Cty. Since 1910 it has been engaged in the business of an advertising agency. In 1919 the plaintiff filed for the year 1918 its tax return upon the basis of a personal-service corporation. The Commissioner of Internal Revenue denied the plaintiff personal-service classification, reaudited plaintiff's return, and assessed a deficiency tax against the plaintiff of $7,718.63. Without paying the tax, the plaintiff appealed to the Board of Tax Appeals. The board, following a hearing, approved, on April 14, 1925, the determination of the commissioner. On March 22, 1926, the plaintiff, under written protest, paid the tax and filed a claim for refund, which on the 29th of May, 1926, was denied by the commissioner. This suit is for the recovery of the deficiency tax paid as above.

Section 200 of the revenue act of 1918, 40 Stat. 1058, provides as follows:

"That when used in this title—

* * * * * * *

"The term 'personal-service corporation' means a corporation whose income is to be ascribed primarily to the activities of the principal owners or stockholders who are themselves regularly engaged in the active conduct of the affairs of the corporation and in which capital (whether invested or borrowed) is not a material income-producing factor; but does not include any foreign corporation, nor any corporation 50 per centum or more of whose gross income consists either (1) of gains, profits, or income derived from trading as a principal, or (2) of gains, profits, commissions, or other income derived from a Government contract or contracts made between April 6, 1917, and November 11, 1918, both dates inclusive."

Section 900 (g) of the revenue act of 1924, 43 Stat. 337, makes the finding of the Board of Tax Appeals *prima facie* evidence of the facts therein stated.

The issue here is one of fact. Both the plaintiff and defendant cite a multitude of cases, too many to review in detail; from them, however, it is apparent that the real contention is centered exclusively upon an ascertainment of facts. If the plaintiff's business activities and corporate organization come within the requirements of the revenue act, it may not be denied the classification for which it contends. This is conceded by both parties to be the established rule, and we need not fortify the statement by a long list of cases heretofore before the Board of Tax Appeals and the courts.

The applicable section of the revenue law imposes upon the plaintiff in this case the establishment of four indispensable facts, which we discuss in order. First, the income of the corporation "is to be ascribed primarily to the activities of the principal owners or stockholders." The Board of Tax Appeals found this fact to have been proven. The record herein corroborates the findings of the board in this respect. The list of stockholders set out in Finding III discloses the number and proportionate ownership of the capital stock of the corporation, and the board found that they were all regularly and actively, to the exclusion of all out-

side interests, engaged in the business. The defendant's challenge to the verity of this finding is rested solely upon what is said to be a situation which negatives the fact of the principal stockholders being actively engaged in the business. The present record discloses that certain stockholders active in the business of the corporation acquired their stock by purchase from H. K. Turnbull, president of the company, by an initial payment of a certain sum in cash, deferred payments to be met out of dividends earned by the company. It is further proven that when certain of these stockholders withdrew from the corporation their stock was repurchased by Mr. Turnbull, he paying therefor all the payments theretofore made thereon, either in cash or by way of dividends, the certificates of stock having been retained by Turnbull until all payments for the same were duly made. The proof is conclusive that the certificates of stock were made out in the name of the purchaser, and the transfer of the same to him, duly authenticated in the books of the corporation. True, the former owner retained what he deemed adequate security for deferred payments on the stock; but the transaction proves a sale on credit. The certificates were merely evidence of ownership of stock, *Pacific National Bank* v. *Eaton*, 141 U. S. 227, and the failure to possess it by the purchaser, if the intention of the parties was to consummate a sale, does not convert the transaction into something other than a sale, *Beardsley* v. *Beardsley*, 138 U. S. 262. The stockholders involved in this transaction were concededly active in the business of the corporation, devoted their entire time to its affairs, and the nominal salaries they received clearly indexes that their primary concern was the production of dividends in which they had a monetary interest as stockholders, and which they received in proportion to their stock interests. We find nothing in the present record to impeach the findings of the board upon this issue.

Next, it is established beyond doubt that the principal stockholders were continuously active in the business. The defendant's contention in opposition to this fact is not sustained by the record. During eleven months of the year

in issue the nonactive stockholders owned 18.2% of the outstanding capital stock of the corporation, and save for a single month did they own more. See *Andrews-Bradshaw Co.* v. *United States*, 65 C. Cls. 354. Treasury Regulations 45, art. 1529, is not in conflict with this holding. We quote it as follows:

"No definite percentage of stock or interest in the corporation which must be held by those engaged in the active conduct of its affairs in order that they may be deemed to be the principal owners or stockholders can be prescribed as a conclusive test, as other facts may affect the presumption so established. No corporation or its owners or its stockholders, however, shall make a return in the first instance on the basis of its being a personal-service corporation unless at least 80% of its stock is held by those regularly engaged in the active conduct of its affairs."

The paid-in capital of the corporation was assuredly nominal and not in any sense a material income-producing factor, unless the defendant's argument to the contrary is sustainable. The fundamental basis upon which the defendant contends for the use of capital as a material factor in producing income is predicated upon the system adopted in carrying on the plaintiff's enterprise. The plaintiff, it is said, paid the publications for advertising space engaged in behalf of its customers in advance of payments received therefor from its customers. In enumerated instances this is true, and manifestly exacted the use of funds. The answer to the contention is found in the case of *Snitzler-Warner Co.* v. *Commissioner*, decided by the Board of Tax Appeals May 2, 1929, 16 B. T. A. 342. The defendant admits that the plaintiff did not guarantee the accounts of its customers with the publishers, and the advance payments made by the plaintiff served only to secure a cash discount from the publishers, which was passed on to the customer by the plaintiff, and established the plaintiff as what is termed a "recognized agency." It is indeed difficult to perceive wherein the method produced income to any material extent. In the *Snitzler-Warner Co. case* just cited the board said:

"The fact that a business has capital, or in certain contingencies might require capital, is not sufficient to deny

personal-service classification, if, in fact, capital is not a material income-producing factor. *S. A. Conover Co.*, Dec. 2302, 6 B. T. A. 679.

"The general practice of the petitioner was to pay bills to publishers after receiving payment from clients. However, in some cases the petitioner did pay publishers amounts due from clients before the clients paid petitioner. The evidence discloses that throughout the year 1920 the average amount petitioner expended to pay publishers' bills before receiving payments, either by notes or cash, from clients was $66,030.22 and that during the year 1921 this amount was $35,504.86.

* * * * * * *

"Did the payment of publishers' bills by petitioner to the extent set forth above affect the volume of petitioner's business in such manner that it might be said that capital was a material income-producing factor? We believe not, when we consider that the gross income of the petitioner for the years 1920 and 1921 was $183,527.80 and $235,381.65, respectively, and that the gross billings for space for the years 1920 and 1921 amounted to $1,338,687.74 and $1,359,510.33, respectively.

* * * * * * *

"We conclude that capital was not a material income-producing factor in petitioner's business during the years in question."

The board in its findings allocated out of the corporation's income certain sums to active stockholders upon the theory of individual responsibility for securing accounts which produced the sums. If one stockholder was attached to a particular advertiser, the paid-in commission received from him was ascribed to the activities of this stockholder. The present record, we think, discloses the error in the finding and overcomes its *prima facie* effect. The proof, clear and convincing, without contradiction from the defendant, establishes a business policy upon the part of the corporation which excludes the possibility of ascribing any definite portion of the annual income to any single stockholder. To secure the account of an advertiser involved individual effort and cooperation from all the interested parties. Customers were not enlisted when first introduced to a stockholder. On the contrary, as a preliminary it was first necessary to investigate the customer's business, ascertain his

sales methods, obtain his publicity needs, and then convince him by a physical exhibit of the intended course to be pursued that the services of the agency would prove profitable. To do this required personal service of a high order, and until it was accomplished no income of significance came into the treasury. If the account of the advertiser was secured, the proof shows, not only individual but combined effort was made to retain it and attain results for the customer. The president of the corporation was in command. He supervised all the accounts and, in cooperation with the other stockholders, was responsible for the income. The fact that one man may have been in charge of a single or several accounts does not entitle him to receive the full credit for the income derived therefrom, for the evidence conclusively shows that the cooperative policy of the corporation enlisted the combined services of the stockholders in meeting with the requirements of its customers. A signal illustration of what we mean is found in the case of Krebs, an active employee of the corporation. Krebs introduced Turnbull to a prospective advertiser, one whose account was especially desirable. Krebs had been in the employ of the prospective customer and stood well with him. The account was afterwards secured, not by reason of anything save the success of Turnbull in making a survey of the customer's advertising needs and convincing him of the possibilities of success. Krebs was not at the time proficient in the business and could not have possibly secured the customer or retained him, because of his admitted inexperience, yet the board ascribed the entire income of the corporation, amounting to $86,155.09, to Krebs. The situation with respect to the other stockholders, aside from Turnbull, is not materially different than in the case of Krebs. True, the others were more experienced, but the income of the corporation was largely due to Turnbull, assisted as stated in the findings.

The findings of the board, with the exception above noted, entitled the plaintiff to classification as a personal-service corporation. They are complete, and we need not go further into detail. The statute was complied with.

Judgment will be awarded the plaintiff for $7,718.63, with interest.

WILLIAMS, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and GRAHAM, *Judge,* concur.

DON R. NORRIS v. THE UNITED STATES

[No. J-542. Decided January 13, 1930]

On the Proofs

Army pay; rental and subsistence allowances; dependent mother.—Plaintiff, an officer in the United States Army, *held* entitled to rental and subsistence allowance in right of a dependent mother, he being practically her sole support.

The Reporter's statement of the case:

Mr. John W. Gaskins for the plaintiff. *Mr. George A. King* and *King & King* were on the briefs.

Mr. M. C. Masterson, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff, Don R. Norris, was from January 1, 1924, to July 1, 1928, the date of the filing of this suit, a captain in the United States Army, on active duty.

II. During the time stated in Finding I, plaintiff received rental and subsistence allowances as an officer without dependents.

III. Plaintiff was unmarried, the immediate members of his family being his mother and a sister, Ruth Norris. Plaintiff's mother was a widow, aged about 63 years at the time of the bringing of this suit. Plaintiff's mother and father were divorced many years ago. In 1912 the mother married one Chester Fitzgerald, of Vancouver, British Columbia.

In 1916 Fitzgerald went away, ostensibly to join the Canadian forces in the World War, and plaintiff's mother

never heard from him or anything of him until in 1927, when she learned he was dead.

From 1916 to the present, plaintiff has contributed regularly to the support of his mother.

IV. From January 1, 1924, to July 9, 1924, he contributed regularly to the support of his mother, and was her sole support, except for about $100.00 she earned by doing advertisement work in January, February, and March, 1924. From January 1, 1924, to July 1, 1924, plaintiff's mother lived at the Whitcomb Hotel, San Francisco, California, plaintiff being stationed at Manhattan, Kansas. Plaintiff during that time contributed $300.00 to his mother's support, payment being made by six fifty-dollar checks.

From August 1, 1924, to June 1, 1927, plaintiff was stationed at Honolulu. His mother accompanied him and lived in a cottage provided by plaintiff, he paying all household expenses, rent, food, etc. He was his mother's sole support during this entire time.

In 1926 plaintiff's mother was in poor health, making it necessary for her to return to the mainland. Plaintiff paid the expenses of her trip and contributed $300.00 in cash to her support from April until her return to Honolulu in August.

Plaintiff returned from Honolulu June 1, 1927, and lived for two months at the Bellevue Hotel in San Francisco, his mother living with him the while, he paying all her expenses.

From August 1, 1927, to July 1, 1928, plaintiff was stationed at Fort Monroe, Virginia. His mother remained in California, where plaintiff paid all her expenses, sending her regularly his check on the first day of each month for $60.00. In addition he gave her about $20.00 each month in money orders and small bills enclosed in letters.

V. From January 1, 1924, to July 1, 1928, plaintiff was his mother's sole support, except the sum of about $100.00, which she earned in the spring of 1924, as stated in Finding IV. During practically all this time she was in poor health, unable to support herself, and entirely dependent on plaintiff. No one other than plaintiff contributed during this time anything whatever to her support. She was without

income other than that received from plaintiff. Ruth Norris, plaintiff's sister, who was unmarried and lived with her mother during these years, was in poor health, and was unable to contribute and did not contribute to the support of her mother.

VI. Plaintiff, if entitled to rental allowance as an officer with dependents from January 1, 1924, to September 9, 1927, and to subsistence allowance from January 1, 1924, to July 1, 1928, has due him approximately $1,900, subject to a more exact computation by the General Accounting Office, whose report for subsistence allowance runs only to May 31, 1928.

The court decided that plaintiff was entitled to recover, entry of judgment to be suspended awaiting report from the General Accounting Office.

WILLIAMS, *Judge*, delivered the opinion of the court:

The plaintiff, an officer in the United States Army, brings this suit to recover the difference in rental and subsistence allowances between those of an officer without dependents, in which status he has been paid, and an officer with a dependent.

Claim is made for rental allowance, because of a dependent mother, from January 1, 1924, to September 10, 1927, and for subsistence allowance from January 1, 1924, to July 7, 1928.

Section 4 of the act of June 10, 1922, 42 Stat. 625, relied upon by plaintiff, provides:

"That the term 'dependent' as used in the succeeding sections of this act shall include at all times and in all places a lawful wife and unmarried children under twenty-one years of age. It shall also include the mother of the officer provided she is in fact dependent on him for chief support."

In *James deB. Walbach* v. *United States*, 67 C. Cls. 239, this court said:

"We believe that Congress intended, by the enactment of the statutes on this subject, to relieve officers of the Army and Navy from the necessity of providing out of their official salary for a mother who is without income sufficient for her support, in accordance with her station in life."

And in *William G. Tomlinson* v. *United States*, 66 C. Cls. 697, 700, this court had before it a case where plaintiff's dependent mother had approximately $10,000 worth of property, which produced an income of $55.00 monthly. We then said:

"The main contention on behalf of the defendant is that, while plaintiff's mother owns this property, she is not dependent upon him for her chief support; and it seems to be claimed that until this property or its proceeds have been exhausted she is not 'in fact dependent.' We think the intent of the law is that where the person alleged to be dependent has property which is returning an income, the case should be determined upon the situation in which the alleged dependent is found, considering the income which she receives from the property, and then determining whether the amount necessary and proper for her support above the amount of her receipts is such that she is dependent 'for her chief support' upon other sources. * * *"

The statute provides that the term "dependent" shall include the mother of the officer provided she is in fact dependent on him for her chief support.

In the instant case the mother of plaintiff was not only dependent on him for her chief support, but he was in fact practically her only support. From January 1, 1924, to July 1, 1928, except for $100.00 which she earned in the spring of 1924, plaintiff's mother received her entire support from him. No one else contributed to her support in any way. During three years of the time she lived with him in a cottage which he maintained at his own expense, and at all other times he sent her checks and money amounting to about $70.00 per month, in addition to financing a trip from Honolulu to the mainland necessary for her health.

It would be hard to conceive a plainer case of dependency of a mother than the one presented here. The mother is a widow, without property or income, in poor health, and has no one except the plaintiff to whom she can look for support. It is true she has a daughter, but the daughter is herself in poor health and is not able physically or financially to contribute to the mother's support. The plaintiff

is the only person in the world upon whom the mother can either legally or morally depend for support.

It was undoubtedly the purpose of Congress to relieve officers situated as plaintiff is here from the burden of taking from salaries, barely sufficient for their own needs, monthly allowances for the support of a dependent mother.

Plaintiff's showing that his mother is dependent on him for her chief support, and also that he has dutifully and generously responded to his responsibility and furnished such support, is overwhelming and conclusive.

The plaintiff is entitled to recover, but the entry of judgment will be suspended to await the coming in of a report from the General Accounting Office showing the amount due under the court's findings and this opinion.

LITTLETON, *Judge;* GREEN, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

PEKIN COOPERAGE CO. v. THE UNITED STATES

[No. H-423. Decided January 13, 1930]

On the Proofs

Income and profits tax; failure to prove deductible loss.—Upon failure of proof as to loss deductible in the ascertainment of net income plaintiff *held* not entitled to recover income and profits taxes paid upon the basis, applied by the Commissioner of Internal Revenue, of no allowance for loss.

The Reporter's statement of the case:

Mr. A. C. Newlin for the plaintiff. *White & Case* were on the briefs.

Mr. George H. Foster, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff, Pekin Cooperage Company, is a corporation duly organized and existing under the laws of the States of Illinois, having its principal place of business at Pekin in said State.

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II. On March 14, 1921, the plaintiff filed with the collector of internal revenue for the eighth district of Illinois its corporation income and profits tax return for the calendar year 1920, showing a total tax liability of $21,636.23.

III. On March 16, 1921, the plaintiff paid to the proper collector of internal revenue the sum of $5,436.23 on account of its 1920 tax liability as above stated and filed a claim in abatement for the balance amounting to $16,200.00.

IV. On June 15, 1921, the plaintiff filed with the proper collector of internal revenue an amended return for the year 1920, showing no tax liability, and on the same day filed a claim for refund of the tax of $5,436.23 theretofore paid.

V. On March 1, 1924, and January 10, 1925, the respective sums of $1,014.12 and $9,544.03, or total of $10,558.15, were credited against the plaintiff's 1920 tax liability as above stated, making total payments or credits against said liability aggregating $15,994.38.

VI. Thereafter the Commissioner of Internal Revenue upon audit and examination of the plaintiff's tax returns for 1920 finally determined the plaintiff's tax liability at $7,771.81, and refunded to plaintiff the sum of $8,222.57.

VII. On January 22, 1926, the plaintiff filed a claim for refund of taxes paid for the year 1920 in the sum of $4,060.88, or such greater amount as might be legally refundable. Thereafter, and under date of June 15, 1926, the said claim for refund was wholly rejected and denied by the Commissioner of Internal Revenue.

VIII. The business of the plaintiff has been the manufacture and sale of cooperage stock, staves, and heading. During 1920 its gross volume of business was approximately $8,000,000. During the period of time involved herein its general offices were at Pekin, Illinois, where its main plant was located. It owned and operated a number of small stave-mill plants in Alabama, Arkansas, Louisiana, Mississippi, and Tennessee. Those plants were temporarily located with a view to their accessibility to timber lands where lumber suitable for the company's requirements could be obtained. At these several plants logs were cut into rough and unfinished staves of desired sizes and from time to time

the staves were shipped to the plaintiff's larger plants to be finished and used in the manufacture of barrels.

IX. Two territorial or divisional offices were maintained by the plaintiff, one of them being at New Orleans, and one at Memphis. The operations of the plants in Tennessee, Arkansas, and northern Louisiana were under the direction and supervision of the Memphis office, and those of the Alabama, Mississippi, and lower Louisiana plants were under the New Orleans office. The branch managers of the several stave-mill plants reported their purchases, their expenditures, their shipments, and their monthly inventories to the divisional office under whose jurisdiction they operated, at stated intervals, and they drew on the plaintiff through its general office for such funds as they needed for their operating requirements, which included the acquisition of necessary timber. All books and records concerning the details of the operations of the several stave-mill plants were kept at the divisional offices. Separate books were not kept for each of the several plants. The divisional offices in turn made regular reports concerning the operations of the plants under their jurisdiction to the general office where only the control books of the corporation were kept.

X. One of the stave-mill plants was located at Troy, Alabama, and it is with that plant that this case is particularly concerned. It was constructed in 1918 or 1919, and it was abandoned in 1923. It was wholly owned by the plaintiff and it was operated by it as one of its units under the management of R. D. Foley, and under the trade name of the R. D. Foley Stave Company. It was under the jurisdiction of the plaintiff's New Orleans office.

XI. Difficulty was encountered in the presentation of the facts in issue in this case because of the plaintiff's inability to produce those of its books and records in which it is claimed transactions pertaining to the operations of the so-called Foley plant at Troy were recorded. It is not even definitely known when the plant was erected and when active operations at the plant were discontinued. Mr. William R. Foley, a former vice president of the plaintiff company, who was in charge of the New Orleans office during the year of 1920, the year involved in this case, was the only witness

called. At the conclusion of his testimony the plaintiff rested its case, as did the defendant. Soon after 1920, during a period of depression in the plaintiff's business, its New Orleans divisional office was consolidated with the Memphis office. At a later date the business was tentatively consolidated with another business at St. Louis, and the records were then shipped to St. Louis. Negotiations for a merger were not completed, and the records were then sent on to New York. Mr. Foley testified that a search had failed to locate the New Orleans records which were kept during the period involved herein, and suggested the probability of their loss during the removal of the company's offices.

XII. The rough staves which were delivered to plaintiff from the Foley plant during the calendar year 1920 were carried into its costs and goods sold at $87,996.66, the Foley plant was credited with that same amount, and in its income-tax return for the year 1920 the plaintiff reported a loss as follows: "Loss on R. D. Foley Stave Company, $40,608.83." The loss as claimed was disallowed.

XIII. It does not satisfactorily appear that the plaintiff suffered the loss claimed in its return and disallowed by the Commissioner of Internal Revenue, or that the commissioner was in error in not allowing this loss. Nor does it appear that the regulation of the commissioner was unreasonable in prescribing the method for the ascertainment of proper and actual costs.

The court decided that plaintiff was not entitled to recover.

GRAHAM, *Judge*, delivered the opinion of the court:

The question in this case is primarily one of fact. The plaintiff claims it is entitled to a deduction of its proper costs in arriving at its net income, and claimed an allowance in its return. The Commissioner of Internal Revenue, under the regulations in force, which regulations were reasonable, found that there was not satisfactory proof as to these costs. Plaintiff claimed a deduction for a loss on certain staves which it had produced. In order to ascertain the loss it was necessary first to prove the actual cost of production, at least to the satisfaction of the commis-

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sioner, and this the commissioner decided had not been done, and so disallowed the amount sued for in this case. In the trial of the case in this court the plaintiff experienced the same trouble. It was unable to prove with any degree of certainty the cost of the production of these staves.

The regulations of the commissioner (Reg. 45, articles 1581–1584) provided that in determining the cost of goods manufactured where the taking of inventories was necessary for the determination of the net income, the inventories at the beginning of the year and end of the year should both be taken on the same basis, and that this basis should be cost, or cost or market, whichever was lower.

The plaintiff was unable to present an inventory showing the original cost of production, nor did the inventory at the end of the year represent either cost or market. It was based upon the average cost of similar products at other plants. There is no satisfactory proof that would justify overturning the judgment and finding of the commissioner in regard to this matter. The burden is on the plaintiff.

The court has found that it does not satisfactorily appear that the plaintiff suffered the loss claimed in its return or that the commissioner was in error in not allowing this loss, and that it does not appear that the regulation of the commissioner was unreasonable in prescribing the method for the ascertainment of proper and actual costs.

In this view the plaintiff is not entitled to recover and the petition should be dismissed. It is so ordered.

WILLIAMS, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

LAURA W. MAXWELL v. THE UNITED STATES

[No. J-665. Decided January 13, 1930]

On the Proofs

Coast Guard pay; retired officers; active-duty status while on sick leave; death gratuity to widow.—A commissioned officer of the U. S. Coast Guard was placed upon the retired list, and there-

Reporter's Statement of the Case

after in active-duty status during which he was granted leave of absence on account of sickness, which leave was extended from time to time until his death at the Naval Hospital. During his entire leave of absence he continued to be a part of the general Coast Guard court and on several occasions signed papers as a member thereof. *Held*, that the officer was in active-duty status at time of death and his widow under the act of June 4, 1920, entitled to six months' gratuity pay.

Same; ruling by Secretary of the Treasury.—The ruling by the Secretary of the Treasury, in construing the act of May 26, 1928, that the status of an officer must be that in which he is placed by competent authority, that he can not of his own volition place himself in sick-leave status or a retired status, and that his status is officially fixed by the proper administrative officer of the service to which he belongs, quoted with approval.

The Reporter's statement of the case:

Mr. George A. King for the plaintiff. *King & King* were on the briefs.

Mr. M. C. Masterson, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. William L. Maxwell was appointed a commissioned officer in the Revenue Cutter Service, now the United States Coast Guard, on July 30, 1895, and resigned July 8, 1902; was reappointed a commissioned officer in the Revenue Cutter Service on December 26, 1902, and continued to serve in the Revenue Cutter Service and the United States Coast Guard on the active list until July 31, 1915, when he was placed on the retired list of the United States Coast Guard by reason of being incapacitated for active service. He resumed his active-duty status by virtue of orders of June 19, 1917, during the World War, and returned to retired status December 27, 1919. At the time of his retirement and thereafter his rank was lieutenant (engineer).

II. Lieutenant (Engineer) Maxwell was again placed on active-duty status by order of the Secretary of the Treasury of February 23, 1926. He reported to Coast Guard headquarters on March 1, 1926, and was assigned permanent station at section base 5, East Boston, Massachusetts, where he remained in active duty until September 1, 1927, when under orders he reported to New York division for duty

on the Coast Guard court at the Brooklyn Navy Yard. On January 28, 1928, he was granted a leave of absence on account of sickness, which leave was extended from time to time until his death at the Naval Hospital, July 6, 1928.

While in the hospital he contemplated going back to duty. He continued during his entire leave of absence to be a part of the general Coast Guard court, and on several occasions warrant officers brought to him at the hospital papers which he examined and signed as a member of the court.

His death on July 6, 1928, was not the result of his own misconduct.

III. On July 26, 1928, W. H. Webb, pay and allotment officer of the United States Coast Guard, transmitted to the Comptroller General a voucher in favor of Laura Wasson Maxwell, widow of Lieutenant William L. Maxwell, United States Coast Guard, retired, deceased, for six months' death gratuity pay amounting to $2,100, under the acts of June 4, 1920, 41 Stat. 824, and May 26, 1928, 45 Stat. 774, and requested a decision as to whether its payment was authorized.

The Comptroller General, August 28, 1928, rendered an opinion to the effect that the payment of the voucher in question could not be made.

On September 11, 1928, the Secretary of the Treasury addressed a letter to the Comptroller General, requesting him to reconsider his decision, in which letter the Secretary stated the construction the Treasury Department gave to the act of May 26, 1928:

"That while the act of May 26, 1928, provides that the retired officer shall receive full pay and allowances 'when on active duty,' it makes the payment of the death gratuity contingent upon the death of the officer 'when on active-duty status.' The act seems to me to emphasize the active-duty status of the officer at the time of his death. The status of an officer must be that in which he is placed by competent authority. He can not, of his own volition, place himself in a sick-leave status or a retired status or an active-duty status. His status is officially fixed by the proper administrative officer of the service to which he belongs."

The Comptroller General refused to reconsider the matter and adhered to his former decision.

IV. William L. Maxwell at the time of his death was a lieutenant, United States Coast Guard, with over 21 years' service. If he was on active-duty status at the time of his death plaintiff is entitled to judgment in her favor of $2,025.00.

The court decided that plaintiff was entitled to recover $2,025.00.

WILLIAMS, *Judge*, delivered the opinion of the court:

The plaintiff, Laura W. Maxwell, sues to recover six months' gratuity pay as the widow of Lieutenant William L. Maxwell, United States Coast Guard, retired, deceased.

Section 6, 32 Stat. 101, of the act of April 12, 1902, applicable to the Revenue Cutter Service, and made applicable to the Coast Guard by section 3 of the act of January 28, 1915, 38 Stat. 802, provides:

"That when a board finds that an officer is incapacitated for active service, and that his incapacity is the result of an incident of service, or is due to the infirmities of age, or physical or mental disability, and not his own vicious habits, and such decision is approved by the President, he shall be retired from active service and placed upon a retired waiting-orders list. Officers thus retired may be assigned to such duties as they may be able to perform, in the discretion of the Secretary of the Treasury."

The act of June 4, 1920, 41 Stat. 824, the annual naval appropriation act, for the expenses of the Navy for the fiscal year ending June 30, 1921, contained the following provision:

"That hereafter, immediately upon official notification of the death from wounds or disease, not the result of his or her own misconduct, of any officer, enlisted man, or nurse on the active list of the Regular Navy or Regular Marine Corps, or on the retired list when on active duty, the Paymaster General of the Navy shall cause to be paid to the widow, and if there be no widow, to the child or children, and if there be no widow or child, to any other dependent relative of such officer, enlisted man, or nurse previously designated by him or her, an amount equal to six months' pay at the rate received by such officer, enlisted man, or nurse at the date of his or her death. The Secretary of the Navy shall establish regulations requiring each officer and enlisted man or nurse

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having no wife or child to designate the proper dependent relative to whom this amount shall be paid in case of his or her death. Said amount shall be paid from funds appropriated for the pay of the Navy and pay of the Marine Corps, respectively: *Provided*, That nothing in this section or in other existing legislation shall be construed as making the provisions of this section applicable to officers, enlisted men, or nurses of any forces of the Navy of the United States other than those of the Regular Navy and Marine Corps, and nothing in this section shall be construed to apply in commissioned grades to any officers except those holding permanent or probationary appointments in the Regular Navy or Marine Corps: *Provided*, That the provisions of this section shall apply to the officers and enlisted men of the Coast Guard, and the Secretary of the Treasury will cause payment to be made accordingly."

Section 17 of the act of June 10, 1922, 42 Stat. 632, as amended by the act of May 26, 1928, 45 Stat. 774, reads:

"* * * Retired officers of the Army, Navy, Marine Corps, Coast Guard, and Coast and Geodetic Survey below the grade of brigadier general or commodore and retired warrant officers and enlisted men of those services shall, when on active duty, receive full pay and allowances, and when on active-duty status shall have the same pay and allowance rights while on leave of absence or sick as officers on the active list, and if death occurs when on active-duty status, while on leave of absence or sick, their dependents shall not thereby be deprived of the benefits provided in act approved December 17, 1919, as amended, and in the act of June 4, 1920. * * *"

Lieutenant William L. Maxwell, deceased, was retired for physical disability, incident to the service and not the result of his own misconduct, effective July 31, 1915. He resumed active duty, under orders June 19, 1917, served during the World War, and under orders was returned to retired status December 27, 1919.

Under orders he reported to the commandant of the Coast Guard, and on March 1, 1926, was assigned to active duty and ordered to proceed to Boston, Massachusetts, and report to the commander section base 5 for duty at that base. He reported to the commander at base 5, Boston, Massachusetts, March 6, 1926, remained there on active duty until September 1, 1927, he was, under orders, detached from base 5

and directed to report to the commander New York division for duty on the Coast Guard court. He reported for duty as directed on September 7, 1927, was assigned to the permanent general and summary Coast Guard courts. He continued to be a member of said courts until his death, July 6, 1928.

On January 28, 1928, he was granted a thirty days' sick leave, which sick leave was extended and continued until his death, in the naval hospital at Brooklyn, July 6, 1928.

The Comptroller General held that the deceased did not have an active-duty status of a retired officer of the Coast Guard at the time of his death, and that consequently the plaintiff is not entitled to the six months' death gratuity pay provided in the statutes above cited.

The question here turns on whether or not Lieutenant Maxwell, at the time of his death, was on "active-duty status."

We think his status is entirely a question of fact.

Secretary Mellon, in a letter of September 11, 1928, to the Comptroller General urging him to reconsider his decision rejecting the payment of this claim, expresses the views of the Treasury Department as to the "status" of Lieutenant Maxwell in the Coast Guard at the time of his death:

"May I point out that while the act of May 26, 1928, provides that the retired officer shall receive full pay and allowances 'when on active duty' it makes the payment of the death gratuity contingent upon the death of the officer 'when on active-duty status.' The act seems to me to emphasize the active-duty status of the officer at the time of his death.

"The status of an officer must be that in which he is placed by competent authority. He can not, of his own volition, place himself in a sick-leave status or a retired status or an active-duty status. His status is officially fixed by the proper administrative officer of the service to which he belongs.

"Lieutenant (E) Maxwell was placed on active-duty status by order of the Secretary of the Treasury dated February 23, 1926. His services were greatly needed and he performed important duty. Under date of January 28, 1928, the commandant of the Coast Guard granted this officer leave of absence on account of sickness and his sick leave continued until his death on July 6, 1928. Under date of

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January 28, 1928, this officer's wife in a telegram to Coast Guard headquarters stated 'doctors anticipate complete recovery and ability to carry on.' The services of Lieutenant (E) Maxwell were greatly needed and Coast Guard headquarters was very anxious that he be able to resume his work at the earliest possible date. It is pertinent to remark that the continuance of this officer on sick leave for a number of months and up to May 26, 1928, in no way conflicted with the views you have expressed in your letter to me August 28, 1928, because at that time under your decision of June 1, 1927, 6 Comp. Gen. 777, the officer was not entitled to receive active-duty pay.

"When the act of May 26, 1928, above referred to, became effective it found Lieutenant (E) William L. Maxwell in an active-duty status, as I view the matter under orders from the Secretary of the Treasury. The fact that he had been on sick leave for a number of months is, in my judgment, no more of a determining factor than would be the case had he been performing his full duty up to and including May 26, 1928, and had happened to be sick and unable to perform his work on the one day, May 26, when the legislation was approved by the President.

"As the Secretary of the Treasury, under date of February 23, 1926, placed the officer on active-duty status, and as the officer was not subsequently restored to a retired status by any competent authority, it appears to me that he was in active-duty status on May 26, 1928, and that his case therefore is specifically covered by the terms of the act of that date. In the interest of the widow of an officer of long and faithful service I request that you will reconsider your decision as set forth in your letter to Mr. Webb of August 28, 1928."

While the opinion of the Secretary of the Treasury that Lieutenant Maxwell was on an active-duty status at the time of his death would not of itself be controlling, his views are entitled to great weight.

In *United States* v. *Moore*, 95 U. S. 760, the court said:

"The construction given a statute by those charged with the duty of executing it is always entitled to the most respectful consideration and ought not be overruled without cogent reasons."

The Secretary of the Treasury, in the exercise of a discretion vested in him by law, on February 23, 1926, placed Lieutenant Maxwell on active-duty status and he was as-

signed by proper authority to active duty in the United States Coast Guard.

The officer subsequent to that date was not restored to a retired status by any competent authority. Consequently we think he retained that status continuously until his death. He continued to be a member of the general Coast Guard court during his entire leave and until his death. On several occasions during this time officers from the court visited him at the hospital and brought with them papers which he signed.

We agree with the Secretary of the Treasury that "the status of an officer must be that in which he is placed by competent authority. He can not of his own volition place himself in a sick-leave status or a retired status. His status is officially fixed by the proper administrative officer of the service to which he belongs."

It is our opinion, therefore, that Lieutenant William L. Maxwell, retired, died when on active-duty status and while on leave of absence on account of sickness.

Plaintiff is entitled to recover and judgment in her favor is hereby entered.

LITTLETON, *Judge;* GREEN, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

SAMUEL E. BROWN v. THE UNITED STATES

[No. H-496. Decided January 13, 1930]

On the Proofs

Army Pay; aviation duty; medical officers.—Medical officers of the Army, who are on duty requiring them to participate regularly and frequently in aerial flights, are entitled to flying pay.

The Reporter's statement of the case:

Mr. John W. Gaskins for the plaintiff. *Mr. George A. King* and *King & King* were on the briefs.

Mr. M. C. Masterson, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

Reporter's Statement of the Case

The court made special findings of fact, as follows:

I. The plaintiff, Samuel E. Brown, has had the following military service:

First lieutenant, medical section, O. R. C	Nov. 6, 1917.
Accepted	Nov. 15, 1917.
Active duty	Dec. 31, 1917.
Captain, medical section, O. R. C	June 4, 1918.
Accepted	June 18, 1918.
Vacated	Sept. 8, 1920.
Captain, Medical Corps (R. A.)	July 1, 1920.
Accepted	Sept. 8, 1920, to present date.

II. Plaintiff was a captain in the medical section of the Officers' Reserve Corps, serving at Kelly Field, South San Antonio, Texas, on September 13, 1919, and was transferred to the Regular Army as a captain in the Medical Corps on July 1, 1920.

On October 16, 1919, plaintiff received Special Orders No. 289, Kelly Field, South San Antonio, Texas, as follows:

"10. Under the provisions of par. 1269½, A. R., the following named officer is hereby announced as being on duty requiring him to participate regularly and frequently in aerial flights from the date as set opposite his name.

"Captain Samuel E. Brown, M. C., Sept. 13th, 1919.

* * * * * * *

"By order of Lieut. Colonel Johnson."

III. The War Department published circular letters regarding the status, duties, and pay of flight surgeons of the Army and with a view toward encouraging medical officers to enter this work.

War Department Circular No. 189, dated April 25, 1919, regarding the office of flight surgeon, set forth that—

"3. The duties of a flight surgeon are essentially as follows:

"He has full charge of everything connected with the physical condition and care of the flier. The flight surgeon lives with and associates with the aviators constantly. In this way he is able to determine when any individual is not in proper condition to fly. In order to do this he must be able, through tact and general efficiency, to gain the confidence of the fliers. For the same reason it has been demonstrated that the flight surgeon should take flying training

and actually become a licensed pilot. Authority has been granted medical officers to take such training, and when they qualify they are entitled to all the rights and privileges of aviators, including the 'wings,' also a 25 per cent increase in pay from the time training is started. Medical officers who have been flight surgeons are enthusiastic over this work. They have undoubtedly saved many lives and much property."

In Circular No. 123, dated October 15, 1919, published by the War Department, the Director of Air Service stated:

"4. Flight surgeons will be encouraged in every way to take flying instruction. Upon completion of the prescribed test, flight surgeons will be rated in the same manner as other flying officers. Applications for flying training should be made through the surgeon to the station commander and will be accompanied by the necessary report of physical examination."

War Department Circular No. 78, published June 14, 1920, regarding flying duties to be performed by a flight surgeon, announced that—

"2. The work performed by the flight surgeon is of great importance in that it has been undoubtedly responsible for the saving of many lives and much Government property, and the Air Service now requires that this specially qualified medical officer be stationed at each active flying field.

"3. On assignment to the medical division of the Air Service medical officers who desire to qualify as flight surgeons are first given a two months' course of instruction in their new duties at the Medical Research Laboratory, Garden City, L. I. On satisfactory completion of this course they are ordered to duty at flying fields. After a few months' practical experience at such stations the officers who make application for the detail will be ordered to a pilots' school for a course of flying training. It has been demonstrated that the flight surgeon who is himself a flier is better qualified to do his special work in that he has experienced all of the sensations of flying, appreciates the stress which the flier undergoes, recognizes more quickly improper handling of airplanes by pilots, when due to staleness or other physical causes, and, most important of all, being a flier, he has the confidence and esteem of his fellow fliers."

It was the duty of the flight surgeon when engaged in aerial flights to observe the physical and mental condition

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of the pilot and report to the commanding officer of the field his physical condition; mental disorders, if any existed; and a general diagnosis of each pilot's condition, in order that the commander of the field might ascertain whether a pilot was in the proper physical and mental condition to meet the monthly flying requirements of the War Department to maintain his flying status, viz, 10 aerial flights or 4 hours in the air. These medical observations prevented many losses of life, injuries to persons, and damage to Government property.

IV. Plaintiff continued on duty requiring him to participate regularly and frequently in aerial flights until relieved therefrom by Special Orders No. 25, dated January 29, 1921, at Kelly Field, reading as follows:

"7. Pursuant to instructions contained in 1st indorsement, War Department, Adjutant General's Office, dated January 20, 1921, the following named officers, Medical Corps, are relieved from duty requiring them to participate regularly and frequently in aerial flights, as required by paragraph 1269½, Army Regulations, effective this date.

"Captain Samuel E. Brown, Medical Corps."

V. During the period from September 13, 1919, to January 29, 1921, plaintiff was on duty requiring him to participate regularly and frequently in aerial flights and was given an increase in pay for such aviation duty amounting to $1,180, which he was later obliged to refund to the Government by deductions from his pay. The first deduction from plaintiff's pay was made in October, 1921, and the last in September, 1923. No part of this sum has been repaid to him.

The court decided that plaintiff was entitled to recover $1,130.00.

GRAHAM, *Judge*, delivered the opinion of the court:

The question here presented involves the right of an officer in the Medical Corps of the Army, with the rank of captain, to increase of pay on account of special detail to flying or aircraft duty as a flight surgeon. The applicable

statutes are the acts of June 3, 1916,[1] 39 Stat. 175, and June 4, 1920,[2] 41 Stat. 769.

On October 16, 1919, the plaintiff received special orders as follows:

"Under the provisions of par. 1269½, A. R., the following named officer is hereby announced as being on duty requiring him to participate regularly and frequently in aerial flights from the date as set opposite his name.

"Captain Samuel E. Brown, M. C., September 13th, 1919.

* * * * * * *

"By order of Lieut. Colonel Johnson."

Thereafter the plaintiff continued on duty required of him by said order until January 29, 1921, when he was relieved from aircraft duty by the following order:

"7. Pursuant to instructions contained in 1st indorsement, War Department, Adjutant General's Office, dated January 20, 1921, the following named officers, Medical Corps, are relieved from duty requiring them to participate regularly and frequently in aerial flights, as required by paragraph 1269½, Army Regulations, effective this date.

* * * * * * *

"Captain Samuel E. Brown, Medical Corps."

The question here presented has been passed upon and so clearly settled by the decisions of this court that it seems only necessary to refer to the cases. *Luskey* v. *United States*, 56 C. Cls. 411, 262 U. S. 62; *Marshall* v. *United States*, 59 C. Cls. 900; *Clark* v. *United States*, 60 C. Cls. 589; *Matteson* v. *United States*, 60 C. Cls. 880; *Bradshaw* v. *United States*, 62 C. Cls. 638; *Lynch* v. *United States*, 63 C. Cls. 91; *Emmons* v. *United States*, 63 C. Cls. 121; *Carleton* v. *United States*, 64 C. Cls. 564; *Arnold* v. *United States*, 65 C. Cls. 43; *Johnson* v. *United States*, 67 C. Cls. 318.

[1] "Each aviation officer authorized by this act shall, while on duty that requires him to participate regularly and frequently in aerial flights, receive an increase of twenty-five per centum in the pay of his grade and length of service under his commission."

[2] "Flying units shall in all cases be commanded by flying officers. Officers and enlisted men of the Army shall receive an increase of 50 per centum of their pay while on duty requiring them to participate regularly and frequently in aerial flights."

In each of these cases the basic principle was that the right to pay went hand in hand with the assignment to the duty. It is clear from all the cases that actual flying or participation in flights was not the test of the right to pay. The fact that in all but one of the cases actual flights took place is not important. The assignment to the duty and the obligation to perform it are the touchstone of the right to pay.

The order of assignment imposed on the plaintiff a new and hazardous duty. The department order required preparation and readiness for a very dangerous duty and exposure in the air to accident in observing the qualities and qualifications of the pilot. Presumably he did participate in flights contemplated by his assignment; but whether he did or not, he stood by ready to do so—a case where he also serves who only stands and waits.

The pay was not by the act fixed upon the basis of the number of flights made, or upon flights actually made, but upon the detail to the duty involved. The duration of the detail constituted a service for which the officer had to keep prepared. During the whole period for which recovery is sought he was under orders of this detail. The increased pay is fixed for the period " while on duty that requires him to participate regularly and frequently in aerial flights." He was lawfully detailed to such duty and during the period of detail was entitled to the increased pay allowed by the statute. This pay which was legally given him and afterward illegally deducted he is entitled to recover, except the $50 checked against plaintiff on October 31, 1921, as to which the statute of limitations had run at the time this suit was brought. Plaintiff is entitled to recover $1,130, and it is so ordered.

WILLIAMS, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

FLORENCE E. HILL, WIDOW OF HENRY L. KINGSBURY AND NATURAL GUARDIAN OF ROBERT HENRY KINGSBURY, A MINOR, v. THE UNITED STATES

[No. K-93. Decided January 13, 1930]

On the Proofs

Coast Guard pay; act of May 4, 1882; repeal by act of June 4, 1920; death gratuity; temporary officers.—(1) The act of June 4, 1920, 41 Stat. 824 (sec. 943, title 34, U. S. Code) covers the entire subject matter of the act of May 4, 1882, providing for gratuity payments, among others, to the surviving dependents of officers and enlisted men of the Coast Guard, effect can not be given to both, and the one repeals the other.

(2) Where a temporary warrant officer of the Coast Guard, dying in line of duty subsequent to the act of June 4, 1920, was appointed directly from civil life and had no status in the permanent forces, his widow is not entitled to the six months' gratuity pay.

United States Code; effect of codification.—In its codification of the permanent laws of the United States in 1926, Congress did not enact new laws or revitalize laws that had been repealed.

The Reporter's statement of the case:

Mr. George A. King for the plaintiff. *Mr. John W. Gaskins* and *King & King* were on the briefs.

Mr. M. C. Masterson, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff, Florence E. Hill, was married to Richard R. Nunnally at Fox Hill, Virginia, on April 26, 1911. One child was born as issue of that marriage. On December 13, 1921, she secured a divorce at Norfolk, Virginia, and obtained custody of the child. On December 27, 1921, she was married to Henry L. Kingsbury at Reidsville, North Carolina. The certificate of marriage was issued to Henry L. Kingsbury and Florence E. Routten. One child, Robert Henry Kingsbury, was born on September 29, 1922, as a result of that union.

II. The plaintiff's deceased husband, Henry Liberal Kingsbury, entered the United States Coast Guard under appointment and oath of office as a temporary pay clerk (a temporary warrant officer) on December 15, 1924, in accordance with the provisions of the act of April 21, 1924, 43 Stat. 105–106, "An act to authorize a temporary increase of the Coast Guard for law enforcement." Prior to his appointment in the United States Coast Guard he had served in the United States Navy and was in the Naval Reserve Corps on active duty as ship keeper on the U. S. S. *Eagle No. 9* until June 23, 1924.

On November 16, 1925, he was attached to and serving on board the Coast Guard cutter *Morrill*, and was a member of a boat's crew which left the *Morrill* November 15, 1925, for Shelbourne, Nova Scotia, for the purpose of obtaining medical treatment for a member of the crew of said vessel. The boat was caught in a heavy squall and capsized, and Temporary Pay Clerk Kingsbury, with seven other members of the crew, was drowned on said date. His death was in line of duty and was not due to any misconduct on his part.

III. On July 28, 1928, plaintiff was married to Frank Hill at Washington, in the District of Columbia.

IV. Henry L. Kingsbury, as a temporary pay warrant officer, was being paid a salary of $168 per month on November 16, 1925, the date of his death.

If it should be held that plaintiff is entitled to recover under the act of June 4, 1920, 41 Stat. 824, there would be due the plaintiff, as widow, six times $168, or $1,008.

If it should be held that plaintiff is entitled to a recovery of two years' pay under the act of May 4, 1882, as amended, section 106, title 14, United States Code, there would be due on behalf of herself and her son, Robert Henry Kingsbury, twenty-four times $168, or $4,032.

The court decided that plaintiff was not entitled to recover.

WILLIAMS, *Judge*, delivered the opinion of the court:

The plaintiff, Florence E. Hill, widow of Henry L. Kingsbury, a deceased temporary warrant clerk, United States

Coast Guard, brings this suit on behalf of herself and minor son, Robert Henry Kingsbury, to recover a sum equal to two years' pay at the rate received by such officer at the time of his death, basing her right to recover on the provisions of the act of May 4, 1882, as amended (now section 106, title 14, United States Code); or in the event that the claim for the two years' death gratuity pay be denied, plaintiff in her own right seeks to recover the six months' death gratuity pay under the provisions of the act of June 4, 1920.

The act of May 4, 1882, chap. 117, section 8, 22 Stat. 57, provides:

"That if any keeper or member of a crew of a life-saving or life-boat station shall hereafter die by reason of perilous service or any wound or injury received or disease contracted in the Life Saving Service in the line of duty, leaving a widow, or a child or children under sixteen years of age, such widow and child or children shall be entitled to receive, in equal portions, during a period of two years, under such regulations as the Secretary of the Treasury may prescribe, the same amount payable quarterly, as far as practicable, that the husband or father would be entitled to receive as pay if he were alive and continued in the service: *Provided*, That if the widow shall remarry at any time during the said two years, her portion of said amount shall cease to be paid to her from the date of her remarriage, but shall be added to the amount to be paid to the remaining beneficiaries under the provisions of this section, if there be any; and if any child shall arrive at the age of sixteen years, during the said two years, the payment of the portion of such child shall cease to be paid to such child from the date on which such age shall be attained, but shall be added to the amount to be paid to the remaining beneficiaries, if there be any."

The act of March 26, 1908, chap. 99, section 3, 35 Stat. 46, amended this act with a provision that a dependent mother should receive the same allowance as that paid to a widow or child of the deceased.

The act of January 28, 1915, 38 Stat. 802, established in lieu of the then existing Revenue Cutter Service and Life-Saving Service the Coast Guard. Section 2 of this act provided:

"Except as herein modified all existing laws relating either to the present Life-Saving Service or the present

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Revenue Cutter Service shall remain of force as far as applicable to the Coast Guard."

and section 3 provides:

" That all existing laws affecting rank, pay and allowances in the present Life-Saving Service and the present Revenue Cutter Service shall apply to the corresponding positions in the Coast Guard and the officers and men transferred thereto and their successors."

The act of May 4, 1882, as amended by the acts of March 26, 1908, and January 28, 1915 (now section 106, title 14, United States Code), reads:

" Gratuities to widow or dependent of deceased officer, etc. If any officer, warrant officer, or enlisted man, on the active list in the Coast Guard, shall hereafter die by reason of perilous service or any wound or injury received or disease contracted in the Life Saving Service in the line of duty, leaving a widow, or a child or children under sixteen years of age, or a dependent mother, such widow and child or children and dependent mother shall be entitled to receive in equal portions, during a period of two years, under such regulations as the Secretary of the Treasury may prescribe, the same amount, payable quarterly as far as practicable, that the husband or father or son would be entitled to receive as pay if he were alive and continued in the service: *Provided*, That if the widow shall remarry at any time during the said two years, her portion of said amount shall cease to be paid to her from the date of her remarriage, but shall be added to the amount to be paid to the remaining beneficiaries under the provisions of this section, if there be any; and if any child shall arrive at the age of sixteen years during the said two years, the portion of such child shall cease to be paid to such child from the date on which such age shall be attained, but shall be added to the amount to be paid to the remaining beneficiaries, if there be any."

The act of June 4, 1920, 41 Stat. 824 (section 943, title 34, United States Code), provides:

" Immediately upon official notification of the death from wounds or disease, not the result of his or her own misconduct, of any officer, enlisted man, or nurse on the active list of the regular Navy or regular Marine Corps, or on the retired list when on active duty, the Paymaster General of the Navy shall cause to be paid to the widow, and if there be no widow, to the child or children, and if there be no widow or child, to any other dependent relative of such officer, en-

listed man, or nurse previously designated by him or her, an amount equal to six months' pay at the rate received by such officer, enlisted man, or nurse at the date of his or her death. The Secretary of the Navy shall establish regulations requiring each officer and enlisted man or nurse having no wife or child to designate the proper dependent relative to whom this amount shall be paid in case of his or her death. Said amount shall be paid from funds appropriated for the pay of the Navy and pay of the Marine Corps, respectively: *Provided*, That nothing in this section or in other existing legislation shall be construed as making the provisions of this section applicable to officers, enlisted men, or nurses of any forces of the Navy of the United States other than those of the regular Navy and Marine Corps, and nothing in this section shall be construed to apply in commissioned grades to any officers except those holding permanent or probationary appointments in the regular Navy or Marine Corps: *Provided*, That the provisions of this section shall apply to the officers and enlisted men of the Coast Guard, and the Secretary of the Treasury will cause payment to be made accordingly."

The right of plaintiff to recover for herself and infant son the two years' gratuity pay provided in the act of May 4, 1882, as amended, depends upon whether the act is still in force and effect, the defendant contending that it was repealed by the act of June 4, 1920.

The act of June 4, 1920, carries no provision expressly repealing the former act, and plaintiff lays much stress upon the fact that the 1882 statute as amended was reenacted by Congress in the codification of the permanent laws of the United States in 1926, as indicating that Congress intended that it should remain the law despite the act of June 4, 1920.

We do not think the inclusion of the 1882 act in the body of laws in the code of 1926 is material to a decision as to whether such act is now the law. If it had been repealed by the express terms of the act of 1920, no one would contend it was reenacted and became again the law merely because it was retained in the code. Congress in codifying the laws did not enact new laws. If the act of June 4, 1920, dealing with the same subject, contained provisions so contradictory and so repugnant to the provisions of the act of 1882 as to clearly indicate the intention of Congress to substitute the new law for the old, the repeal was just as effec-

tive as if the repeal had been expressly stated. In that case it ceased to be the law and the fact that it later appeared in the code would not revitalize it with life and make it again the law.

In the *United States* v. *Tynen*, 11 Wallace 88, Mr. Justice Field laid down the rule that has since been followed by the courts:

"There is no express repeal of the 13th section of the act of 1813 declared by the act of 1870, and it is a familiar doctrine that repeals by implication are not favored. When there are two acts on the same subject the rule is to give effect to both if possible. But if the two are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first; and even where two acts are not in express terms repugnant, yet if the latter act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act."

In an earlier case, *Norris* v. *Crocker*, 13 Howard 429, Mr. Justice Catron lays down the same rule:

"As a general rule, it is not open to controversy that where a new statute covers the whole subject matter of an old one, adds offenses, and prescribes different penalties for those enumerated in the old law, that then the former statute is repealed by implication; as the provisions of both can not stand together."

The act of June 4, 1920, covers the whole subject embraced in the act of May 4, 1882, as amended. The subject matter of both acts is the granting of death gratuity benefits. The act of 1882 provided gratuity benefits on the death of "any officer, warrant officer, or enlisted man on the active list." The act of 1920 provides gratuity benefits on the death of "any officer, enlisted man, or nurse on the active list," and extends such benefits to retired officers and enlisted men when on active duty.

The act of 1882 made the gratuity granted payable to the widow, child, or children under sixteen years of age, and dependent mother, in equal portions.

The act of 1920 makes the gratuity granted payable (1) to the widow, (2) if there be no widow, to the child or

children, (3) if there be no child or children to any other dependent relative of such officer as he may designate.

The act of 1882 makes the gratuity payment contingent on death having resulted by reason of perilous service or any wound or injury received or disease contracted in the service in line of duty.

The act of 1920 grants the gratuity payments in the event of death from wounds or disease not the result of the officer's, enlisted man's, or nurse's own misconduct.

The act of 1882 awards a death gratuity payment for two years at the salary received by decedent at the time of death.

The act of 1920 awards a death gratuity payment for an amount equaling six months' salary of decedent at the time of death.

The statute of June 4, 1920, completely and wholly covers the subject matter of the statute of 1882.

While the two years' gratuity pay awarded in the 1882 statute is reduced to six months' pay by the statute of 1920, it is, taking the whole personnel of the Coast Guard into consideration, a more liberal statute than the 1882 act, in that it makes the provisions for gratuity pay applicable to all enlisted men, officers, and nurses who die while in active service from causes not due to their own misconduct, while the act of 1882 restricted the death gratuity benefits to cases where death resulted by reason of perilous service or from wounds received or disease contracted in line of duty.

While the act of 1920 does not carry any express provision repealing the former act, no one can doubt that it was the intention of Congress to substitute the new act for the old. When it is further considered that the two acts are so obviously and irreconcilably in conflict, and their provisions are so repugnant one to another that effect can not be given to both, we are compelled under the rule long established by the courts and universally adhered to in such cases to hold that the act of May 4, 1882, as amended, was repealed by the act of June 4, 1920.

Plaintiff's claim for two years' death gratuity pay for herself and her son, Robert Henry Kingsbury, in the sum of $4,032 must therefore be rejected.

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The question to be next considered is whether or not the plaintiff is entitled to the six months' gratuity pay provided in the act of June 4, 1920.

Henry L. Kingsbury was appointed a temporary pay (warrant) clerk in the United States Coast Guard and took the oath of office December 15, 1924. He was drowned November 16, 1925, while in such service, his death not resulting from his own misconduct.

He was appointed in the Coast Guard under the act of April 21, 1924, 43 Stat. 105, 106, entitled "An act to authorize a temporary increase of the Coast Guard for law enforcement."

"SEC. 6. (a) Under such regulations as he may prescribe, the Secretary of the Treasury is authorized to appoint temporary warrant officers, and to make special temporary enlistments, in the Coast Guard. No person shall be entitled to retirement because of his temporary appointment or enlistment under this section.

"(b) Any enlisted man in the permanent Coast Guard may be appointed as a temporary warrant officer. Notwithstanding such temporary appointment, any such enlisted man shall be entitled to retirement in the same manner as though he had continued to hold his permanent rating, and upon the termination of such temporary appointment shall be entitled to revert to such rating. Service under any such temporary appointment shall be included in determining length of service as an enlisted man."

The act of June 4, 1920, limits the payment of death gratuities to the widow, children, and dependents of enlisted men, officers, and nurses, of the regular forces of the Navy and Marine Corps. The proviso making the provisions of the act applicable to the Coast Guard would carry a like limitation to members of that organization:

"Immediately upon official notification of the death * * * of any officer, enlisted man, or nurse on the active list of the regular Navy or the regular Marine Corps * * * the Paymaster General of the Navy shall cause to be paid * * *."

Any doubt that the language of the statute above quoted excludes from the benefits therein provided officers in the temporary forces of the Coast Guard is removed by the language of the proviso immediately following:

"* * * That nothing in this section or in other existing legislation shall be construed as making the provisions of this section applicable to officers, enlisted men, or nurses of any forces of the Navy of the United States other than those of the regular Navy and Marine Corps, and nothing in this section shall be construed to apply in commissioned grades to any officers except those holding permanent or probationary appointments in the regular Navy or Marine Corps: *Provided*, That the provisions of this section shall apply to the officers and enlisted men of the Coast Guard, and the Secretary of the Treasury will cause payment to be made accordingly."

A decision of the Comptroller General, 6 Comp. Gen. 407, is cited on behalf of plaintiff wherein benefits under the six months' death gratuity act were held to apply to a temporary warrant officer appointed during his enlistment in the regular Coast Guard.

The temporary officer in the case cited was an enlisted man in the regular Coast Guard at the time of his appointment as temporary warrant officer, and as such his widow was entitled to the death gratuity pay. The widow was awarded the death gratuity payment, not because her deceased husband was a temporary warrant officer but because he was an enlisted man in the regular Coast Guard.

The decision of the comptroller was based on section 8 of the act of April 21, 1924:

"Nothing contained in this act shall operate to reduce the grade, rank, pay, allowances, or benefits that any person in the Coast Guard would have been entitled to if this act had not become law."

The act of June 4, 1920, having authorized payment of a death gratuity equal to six months' pay to the widow of an enlisted man, her right thereto under section 8, above quoted, was not defeated by reason of his temporary appointment as a warrant officer. He had a permanent status in the regular Coast Guard to which he would revert upon the conclusion of his services as temporary warrant officer. The case of temporary officer Kingsbury was different. As has been said, he was appointed from civil life and would automatically go back to civil life upon the termination of his tem-

Syllabus

porary service. He did not have a permanent status in the Coast Guard as an officer or otherwise.

The intent of the act undoubtedly is to encourage the building up of the permanent establishment of the Coast Guard, and its benefits are limited to members of the permanent Coast Guard establishment. The death-gratuity allowance is in the nature of a small insurance provided by the Government for the dependents of those who die in active serice, and, like the retirement and other benefits and privileges provided, tends to make permanent service in the Coast Guard more attractive.

Henry L. Kingsbury was a temporary warrant officer. The plaintiff (his widow) is not entitled to receive the six months' death gratuity pay provided in the act of June 4. 1920, for widows of officers of the regular forces of the Coast Guard.

It is adjudged that plaintiff's petition be dismissed, and it is so ordered.

LITTLETON, *Judge;* GREEN, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

GOTHAM CAN CO v. THE UNITED STATES [1]

[No. J-255. Decided January 20, 1930]

On the Proofs

Income and profits taxes; new assessment within statutory period; collection thereafter; vested right to refund; restrictions upon suits against the United States.—See *Oak Worsted Mills* v. *United States*, *ante*, p. 539.

Same; sec. 1106 (a), revenue act of 1926; extinction of liability.—Section 1106 (a) of the revenue act of 1926, providing that "the bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax," permits the Government, in suit for refund, where collection was made prior to passage of the revenue act of 1926, to retain, without regard to limita-

[1] Certiorari dismissed.

tions, so much of a timely assessed tax as was not an overpayment, notwithstanding collection was made after the statutory period had run.

The Reporter's statement of the case:

Mr. Theodore B. Benson for the plaintiff. *Mr. Joseph R. Little* was on the briefs.

Mr. George H. Foster, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

Plaintiff is a corporation, and on April 22, 1919, made to the Commissioner of Internal Revenue its corporation income and profits tax return for the year 1918, and reported therein taxes due in the sum of $23,769.95, which was duly paid by plaintiff.

The Commissioner of Internal Revenue, in September, 1922, assessed an additional tax against plaintiff for the year 1918 in the amount of $43,467.92, and on October 17, 1922, demanded payment thereof from plaintiff. On October 27, 1922, plaintiff filed a claim for abatement of the taxes assessed for 1917 to 1920, inclusive, in the amount of $80,362.98, which amount included the amount of additional taxes assessed for the year 1918. In April, 1924, the commissioner notified plaintiff that this claim for abatement, in so far as it related to additional taxes for 1918, would be allowed in the sum of $7,346.74 and rejected in the amount of $36,121.18, for which amount, together with interest and penalty thereon amounting to $2,070.84 (a total of $38,192.02), the commissioner made demand upon plaintiff on October 2, 1924, and with such demand stated that if payment thereof was not received in ten days collection would be made by seizure and sale of property.

The amount so demanded, together with penalty and interest, was paid to the defendant as follows:

June 16, 1924	$1,085.04	Cr. 1919
June 16, 1924	13,226.57	Cr. 1917
Oct. 16, 1924	21,809.57	Pd.
Oct. 16, 1924	2,070.84	Pd.
	38,192.02	

On June 15, 1927, the plaintiff filed with the commissioner its claim in due form for refund of the sum so paid in the amount of $38,192.02, which was rejected by the Commissioner of Internal Revenue.

The court decided that plaintiff was not entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

This suit is brought to recover taxes alleged to have been illegally collected from the plaintiff. It appears without dispute that in April, 1919, the plaintiff made a return of its corporation income and profits tax for the year 1918 and paid taxes in accordance therewith. In September, 1922, the Commissioner of Internal Revenue assessed an additional tax against plaintiff for the year 1918 in the amount of $43,467.92, and on October 17, 1922, demanded payment thereof from the plaintiff. On October 27, 1922, plaintiff filed a claim for abatement of the taxes assessed for 1917 to 1920, inclusive, which claim included the amount of additional taxes assessed for the year 1918. Upon consideration of the claim for abatement, in April, 1924, the commissioner notified the plaintiff that this claim for abatement, in so far as it related to additional taxes for 1918, would be allowed in the sum of $7,346.74 and rejected in the amount of $36,121.18, for which amount, together with interest and penalty thereon amounting to $2,070.84, a total of $38,192.02, the commissioner made demand upon plaintiff on October 2, 1924, and with such demand stated that if payment thereof was not received in ten days, collection would be made by seizure and sale of property. Shortly thereafter, plaintiff paid the amount demanded and received credit therefor as shown in the Findings of Fact. On June 15, 1927, the plaintiff filed, in due form, a claim for refund of the sum so paid, which was rejected by the Commissioner of Internal Revenue.

The facts present a case in which a tax additional to that shown by the return of plaintiff was assessed within the proper time by the Commissioner of Internal Revenue. A claim of abatement was then filed by the plaintiff, which,

after consideration, was, about a year and a half later, partially allowed by the commissioner, who, at the later date and after the statute of limitations had expired, made demand for the tax as finally determined, accompanied with the statement that unless the tax was received in ten days collection would be made by seizure and sale of the property. Plaintiff paid the tax in accordance with the demand, and about two years and eight months later filed a claim for refund of the taxes so paid, which claim was rejected by the commissioner.

The claim of the plaintiff is that the collection of the tax was prohibited by section 250 (d) of the revenue act of 1921, and was erroneous and illegal. On the part of defendant, it is urged that sections 607 and 611 of the act of 1928 prevent any recovery on the part of the plaintiff.

The views of this court upon the questions involved, with one exception, are very fully expressed in the decision upon the similar case of *Oak Worsted Mills* v. *United States*, No. J–180, decided December 2, 1929 [*ante*, p. 539] and we think it unnecessary to say anything more on the points therein determined than that we see no reason to change the conclusion set out in the opinion rendered therein.

In addition to the cases cited as supporting the opinion in the *Oak Worsted Mills case*, *supra*, the recent case of *Goodcell* v. *Graham & Foster*, 35 Fed. (2d) 586, is directly in point and holds that by section 611, "Congress evidently intended to cover cases where actual delay had resulted from the filing of a claim in abatement. The idea of a legal, or compulsory, or involuntary stay is neither expressed nor implied."

The one point which was not raised or decided in the *Oak Worsted Mills case* relates to the construction of section 1106 (a) of the act of 1926 (repealed by the act of 1928). Section 612 of the act of 1928 reads as follows:

"Section 1106 (a) of the revenue act of 1926 is repealed as of February 26, 1926."

The act of 1928 was not approved until May 29, 1928. This case was begun May 4, 1928. Whether this repealing clause would affect an action which was begun before the

1928 act went into effect, we do not find it necessary to determine, for the reason that in our opinion section 1106 of the act of 1926 is of no benefit to plaintiff if held applicable. On the contrary, we think it clearly indicates the intention of Congress to provide that a suit can not be maintained to recover taxes collected after the period of limitations has run, if the taxes so paid had originally been rightfully assessed.

Counsel quote from the section last above referred to as follows:

"The bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; * * *."

It is contended on behalf of plaintiff that this provision created a vested right in plaintiff of which it could not be deprived without due process of law and without just compensation. There might be some basis for this argument if the provision of the law stopped with the language above set out, and at some later date or possibly by some provision in some other section of the same act a limitation was fixed upon the effect of the language quoted. But in construing a statute, part of a sentence can not be lifted out and entirely separated from qualifying words contained in another clause thereof. It will be observed that the part of the statute quoted ends with a semicolon. The remainder of the sentence must be considered in connection with the portion set out above. It is as follows:

"but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax."

This is a qualifying clause. Manifestly the two clauses must be read and construed together, and in such a case as we have here the second clause is clearly a limitation on the effect of the first clause. The meaning is clear. By the first clause it was intended to extinguish the liability and prevent collection of any tax barred by the statute of limitations, but under the second clause of the section it was made clear that if the tax had been collected after the limitation period but prior to the passage of the revenue act of 1926, only the

amount collected in excess of the correct tax for the year could be recovered. If it is not so construed, the words of the second clause are obviously of no use whatever in any case. No citations are needed to show that we should construe the words of the second clause so as to give some force and effect thereto if this can consistently be done, but it requires no straining of the language to construe section 1106 in the manner stated above. The language is specific and direct, that there shall be no refund unless the taxpayer has overpaid the tax. In other words, there was to be no refund where the taxpayer had paid only the tax which was originally due and owing notwithstanding the statute of limitations had run against the collection thereof. In this case, there being no evidence to the contrary, the presumption is that the tax was originally due and owing and that the taxpayer has not overpaid the tax. Section 1106 vested no right in the taxpayer who had not overpaid the tax. On the contrary, it is specifically declared that no refund should be allowed him. The whole matter may be summed up by saying that the plaintiff was deprived of no vested right for the reason that the right which he claims never came into existence under the statute.

It should be kept in mind in considering cases of this nature that the right to bring a suit at all against the Government is purely statutory, and that the right to recover back taxes wrongfully collected rests upon the same basis. The Government may limit this right by statutory directions and refuse to refund the tax even where it is wrongfully collected, if application is not made in the manner provided by law, and may provide, as it has in this case, that an action shall not be maintained to a successful conclusion under certain circumstances. In this particular case, the matters necessary to maintain the action did not exist. The provision under discussion did not forbid suit being brought. It merely attached a condition to its being successfully maintained. As was said in *Rock Island R. R.* v. *United States*, 254 U. S. 141, 143;

"If it [the Government] attaches even purely formal conditions to its consent to be sued those conditions must be complied with." As this court only considers claims against

the United States, it is continually being reminded of these principles which must be applied to the case at bar.

There are some decisions of the United States district courts, or the circuit courts of appeals, which ought to be noticed in this connection. The case of *Aroline C. Gove* v. *Nichols, Collector*, 23 Fed. (2d) 856, sustains the position taken by plaintiff in the case at bar. The case just cited was one in which taxes were collected after the period of limitation had expired by means of threats to distrain the taxpayer's property. The case seems to have been submitted on an untenable basis on behalf of the Government, in that it was claimed that the provisions prohibiting a credit or refund, unless the tax was overpaid, operated to keep alive the taxpayer's liability. Such was not the case. It simply prevented any suit from being maintained unless the taxpayer had overpaid the tax, and the court was entirely correct in rejecting this contention. The court was also correct in holding that at the time the taxes were paid, the "Government was wholly without remedy to enforce the payment of the tax." On this basis alone, it held that the taxpayer could mainain his action to recover the taxes paid, although he had not shown that he had overpaid the tax, but this does not follow. As we have shown above, this would depend entirely on whether the Government authorized a suit to be maintained under such circumstances and for that purpose.

The case of *Mertz* v. *Mellon*, decided by the Supreme Court of the District of Columbia January 20, 1928, C. C. H. No. D-8107, page 8233, also involved the construction of section 1106, but only so far as the first clause of subdivision (a) is concerned. In that case the plaintiff sought to obtain relief by injunction against the execution of a distraint warrant issued to secure payment of what was claimed to be an overassessment of income taxes, the warrant having been issued after the expiration of the period of limitation for the collection thereof. The court refused to dismiss the bill, holding quite properly that the liability had been extinguished, but it will be observed that in this case the question of what taxes might be recovered by suit against the Government was not involved, and therefore the decision has no application to the case at bar.

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The case of *Pepsin Syrup Co.* v. *Schwaner*, 35 Fed. (2d) 197, is one that seems to directly sustain the contention of plaintiff. In that case, however, a concession made on the part of defendant would seem by implication to yield the real point in the case, which was apparently not considered by the court. Here again it appears that it was not noticed that in the same sentence of section 1106 which provided that the liability should be extinguished, a qualifying clause was added which limited the first clause so that "no credit or refund * * * shall be allowed unless the taxpayer has overpaid the tax"; and that no vested right was or could be acquired beyond what this provision permitted.

In the case of *Ellay Co.* v. *Bowers*, 25 Fed. (2d) 637, the court said:

"While section 1106 (a) secures repayment of outlawed taxes which have been collected, it also permits the Government to retain so much of the tax paid before the expiration of the limitations provision against collection as represents the correct amount of the tax actually due *and computed without regard to the limitations provisions*." (Italics ours.)

The two statements contained in this sentence are not consistent except under a construction for which we think no one will contend. There was no necessity for the enactment of section 1106 in order to "permit the Government to retain so much of the tax paid before the expiration of the limitations provision against collection as represents the correct amount of the tax actually due." The Government, of course, could retain taxes "actually due" which were paid before the period of limitation had expired before the enactment of section 1106 and without regard to it after it had been enacted. In such cases there was no liability to extinguish. It had already passed out of existence. Evidently what Congress had in mind when section 1106 was adopted was the well-known principle so often repeated in court decisions, that the expiration of the period of limitations does not extinguish the debt or claim but only bars the remedy, and it was intended by this section to make an exception to this rule. We think that under no possible construction of section 1106 (a) can it be construed as ap-

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plying to taxes "paid *before* the expiration of the limitations provision against collection." (Italics ours.) It manifestly refers solely and only to taxes collected after the expiration of the limitations provision, and we therefore think that this statement was made either by inadvertence or that there is in some way a typographical error in connection with it. Eliminating this statement with reference to taxes collected before the expiration of the limitations provision, the statement would be correct: That section 1106 (a) permits the Government to retain "so much of the tax paid * * * as represents the correct amount of the tax actually due and computed without regard to the limitations provisions." This is what section 1106 (a) in fact did. It permitted that portion of the tax which had been collected and which was not an overpayment to be retained by the Government "without regard to the limitations provisions." If we have correctly interpreted the meaning of the language of the court, the decision in the *Ellay Co. case*, *supra*, supports what, in our opinion, is the correct construction of section 1106 (a). While we think it is impossible to reconcile the two statements which we have quoted from the opinion therein, it is quite clear that in any event it can not be held to be an authority for what plaintiff contends. The Supreme Court has, it is true, denied certiorari in the case (277 U. S. 606), but the question in the case was an altogether different one from that to be considered in the case at bar. It was not a case where the tax had been collected and the plaintiff was seeking to obtain a refund, but a case where, after the expiration of the period of limitations for the collection of the tax, a warrant of distraint had been issued and seizure was about to be made thereunder. The ultimate question was whether an injunction against the enforcement of the distraint warrant should be denied on the ground that plaintiff had an adequate remedy at law. It would seem quite obvious that by paying the tax and then bringing suit for a refund thereof the plaintiff would obtain adequate relief—that is, such relief as the court found it was entitled to. The courts have been repeatedly petitioned to entertain suits to restrain distraint on the ground that the alleged tax was unconstitutional

(*Bailey* v. *George*, 259 U. S. 16), or outlawed (*Graham* v. *Du Pont*, 262 U. S. 234; *Cadwalader* v. *Sturgess*, 297 Fed. 73, 265 U. S. 584), but in the cases cited and many others the courts have uniformly refused to restrain the enforcement of the distraint warrant except under the one condition provided in the 1926 and 1928 acts, namely, that the statutory notice has not been given. The decision therefore of the Supreme Court denying certiorari in the *Ellay Co. case* has no bearing upon the questions involved herein.

It follows from what has been said above that while the statute does not permit plaintiff to maintain its action it has lost no vested right and its petition must be dismissed. It is so ordered.

WILLIAMS, *Judge*, and LITTLETON, *Judge*, did not hear and took no part in the decision of this case.

GRAHAM, *Judge*, and BOOTH, *Chief Justice*, concur.

WESTCLOX COMPANY (FORMERLY WESTERN CLOCK CO.) v. THE UNITED STATES

[No. E-402. Decided January 20, 1930]

On the Proofs

Income and profits tax; deduction for exhaustion or depreciation of patents acquired prior to March 1, 1913.—The worth of certain machine patents, owned by plaintiff taxpayer, in computing deductible exhaustion or depreciation in income and profits tax return, ascertained as of March 1, 1913, by proof of savings over competitor's methods of manufacture, and by the use of "Hoskold's formula." The worth of plaintiff's design patent likewise ascertained by the aid of the same formula.

The Reporter's statement of the case:

Mr. Thomas G. Haight for the plaintiff. *Messrs. Robert H. Montgomery*, *J. Marvin Haynes*, *E. B. Wilkinson*, and *James O. Wynn* were on the briefs.

Mr. Dwight E. Rorer, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff is an Illinois corporation, with its principal place of business in the city of Peru, Illinois. It was originally incorporated as the Western Clock Manufacturing Company, which name was later changed to Western Clock Company, and in December, 1923, was again changed to Westclox Company. From its incorporation in 1887 until 1902 plaintiff's operations were substantially confined to the manufacture and sale of clocks and clock movements, and subsequent to 1902, the manufacture and sale of watches and watch movements were included in plaintiff's operations in addition to the manufacture and sale of clocks and clock movements. Operations connected with manufacture included methods for decreasing costs and improving efficiencies of manufactured products; and operations connected with sales included methods for increasing quantities of prices and sales.

II. On or about March 28, 1918, plaintiff filed with the collector of internal revenue for the first district of Illinois its income and excess-profits tax return for the calendar year 1917. Said return showed a tax liability for $201,673.84.

III. On or about June 21, 1918, plaintiff paid to the said collector of internal revenue the said sum of $201,673.84.

IV. On or about July 30, 1919, plaintiff filed with said collector of internal revenue an amended income and excess-profits tax return for the calendar year 1917, disclosing a tax liability of $186,752.46.

V. The Commissioner of Internal Revenue advised plaintiff by letter under date of June 30, 1925, that the tax liability for 1917 was $154,220.19 and that there would be allowed a credit of $47,453.65 for 1917, which sum is the difference between the tax liability and the sum of $201,673.84, set forth in Finding III.

There is no satisfactory evidence as to what part of the $47,453.65 still stands as collectible by plaintiff.

The commissioner's letter of June 30, 1925, plaintiff's Exhibit 26, is by reference made a part of this finding.

VI. On or about June 15, 1919, plaintiff filed with the collector of internal revenue for the first district of Illinois

its income and excess-profits tax return for the calendar year 1918. Said return showed a tax liability of $308,940.85.

VII. On or about July 30, 1919, plaintiff filed with the said collector of internal revenue an amended income and excess-profits tax return for the calendar year 1918. Said amended return showed a tax liability of $313,155.66.

VIII. Plaintiff paid to the said collector of internal revenue said amount of $313,155.66, as follows:

On March 14, 1919	$90,000.00
On June 14, 1919	64,470.43
On September 13, 1919	80,000.00
On December 13, 1919	78,685.23
	313,155.66

IX. On or about June 5, 1899, plaintiff employed Andrew H. Neureuther as its chief engineer. His duties included the designing and fabrication of machinery for building clocks. In 1908 plaintiff began to use an automatic machine for manufacturing pinions and wheels, which machine was designed by Neureuther. The machine is supplied with both shaft and pinion wire in coils or reels, blanked wheels and washers, and turns out the finished product. The shaft or pivot wire and pinion wires are cut off automatically while held in proper relationship; molten metal is then injected into a mold in which the wires are located, which unites the pinion wires with the shaft. The mold into which the metal has just been injected is then capped with a zinc washer which is fed into the machine automatically. The machine next automatically feeds a gear wheel which is lined up on the pinion and shaft, and molten metal is again automatically injected, which unites the washer, the shaft, the pinion wires or leaves, and the wheel, into one integral completed unit.

X. The machine described in Finding IX was made the basis of an application for U. S. letters patent on July 5, 1902. As the result of such application, and a requirement for division by the Patent Office, there was issued to plaintiff, as assignee of Andrew H. Neureuther, patent #782,869 on February 21, 1905, and patent #844,389 on February 19,

1907. Both patents were owned by plaintiff from their date of issue to their expiration.

A copy of patent #782,869, defendant's Exhibit 8, and a copy of patent #844,389, plaintiff's Exhibit 11, are by reference made a part of this finding.

XI. The monopoly granted to plaintiff by virtue of issuance of patent #782,869 is directed to that part of the mechanism of the aforesaid machine which functions to cast molten metal around the assembled parts of the gear wheels or pinions while they are held in proper relationship.

XII. The monopoly granted to plaintiff by the issuance of patent #844,389 is directed to that part of the mechanism of the aforementioned machine which functions to feed the pivot or shaft wire and the pinion wires into proper assembled pinion-forming relation.

XIII. By the use of the machine described in Finding IX, one man could produce 5,000 wheels per day.

Stated on a comparative basis with former wheel-production methods as exemplified by those employed by plaintiff prior to the introduction of the machine, one man with the machine can produce the equivalent output of three men without the machine.

XIV. The cost of production, including material, labor, and overhead per 10,000 clock wheels made by the use of the machine described in Finding IX, for the years 1908 through 1912, was as follows:

1908	$212.14	1911	$237.70
1909	208.61	1912	242.52
1910	238.24		

This data is obtained from the figures given in plaintiff's Exhibit 23, which is by reference made a part of this finding.

XV. The cost of production, including material, labor, and overhead, per 10,000 wheels, if produced by former wheel-production methods, would have been as follows for the years 1908 to 1912, inclusive:

1908	$442.22	1911	$470.25
1909	439.02	1912	481.09
1910	476.86		

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This data is obtained from plaintiff's Exhibit 24, which is by reference made a part of this finding. The savings realized by the use of the aforesaid machine per 10,000 wheels for the years 1908 through 1912 are as follows:

1908	$230.08	1911	$232.55
1909	230.41	1912	238.57
1910	238.62		

These figures show an average annual saving of $234.05 per 10,000 parts for 1908–1912, inclusive.

XVI. The following tabulation of figures from plaintiff's Exhibit 30, by reference made a part of this finding, gives the total number of wheels manufactured per year from 1908 to 1912, inclusive:

1908	1,079,599	1912	1,703,933
1909	1,228,161		
1910	1,476,328		7,102,653
1911	1,614,632		

The average rate of increase per annum in the production of parts from 1908 through 1912 was 155,000 in round figures.

XVII. The expiration date of patent #844,389 was February 19, 1924, and the expiration date of patent #782,869 was February 21, 1922, giving an average expiration date for the two patents of February 20, 1923, or an average life for the two patents of approximately 10 years from March 1, 1913.

The estimated number of parts to be made in ten years from March 1, 1913, would be as follows, based on an average annual increase of 155,000:

Parts produced year 1912	1,703,933
Add average yearly increase	155,000
	1,858,933
5/6 of above amount (3/1/13 to 12/31/13)	1,549,111

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Estimated number units:	
1914	2,013,933
1915	2,168,933
1916	2,323,933
1917	2,478,933
1918	2,633,933
1919	2,788,933
1920	2,943,933
1921	3,098,933
1922	3,253,933
1923, using 2/12 of 3,408,933	568,155
Total number of parts	25,822,663

This number of parts with an average annual saving of $234.05 per 10,000 parts would result in a total saving of $604,379.43.

XVIII. The worth as of March 1, 1913, of the saving of $604,379.43 spread over a ten-year period from that date to March 1, 1923, computed by Hoskold's formula, using 8% and 4%, is $370,121.96.

XIX. On August 29, 1911, there was issued to plaintiff, as assignee, a design patent on a casing for alarm clocks, #41,725, the design patent to run for a term of fourteen years. Clocks made by plaintiff in accordance with this design were known as "Big Ben" and "Baby Ben." This patent is plaintiff's Exhibit 12, which is by reference made a part of this finding.

XX. It was the custom of plaintiff to keep the accounts for its various clock products under distinct segregations or names, and during the fifteen years next prior to 1909 it had manufactured and sold large quantities of clocks and clock movements under different and distinctive segregations or names.

XXI. In September, 1908, plaintiff applied for and in January, 1909, received registered trade-mark "Big Ben." A copy of this trade-mark is in evidence as defendant's Exhibit 4 and is by reference made a part of this finding. Immediately thereafter plaintiff began the manufacture and sale, in addition to its other line of clock products, of a line of clocks designated as "Big Ben." This product is illustrated in plaintiff's Exhibit 14, which is by reference made

a part of this finding. Plaintiff continued such manufacture and sale to March, 1913, and in 1910 and continuously thereafter until March, 1913, plaintiff spent certain sums of money for advertising, and charged such sums directly to a segregation of its accounts designated as "Big Ben," the costs of manufacture and proceeds of sales being charged and credited to the same segregation. The sales prices of the line designated as "Big Ben" included a much higher proportion of profit for plaintiff than did their other lines of clock products.

XXII. In 1910 plaintiff began the manufacture and sale, in addition to its other lines of clock products, of a line of clocks designated as "Baby Ben." This clock product is illustrated in plaintiff's Exhibit 28, which is by reference made a part of this finding. Plaintiff expended sums of money for advertising and kept its accounts for this line of products under the segregation "Baby Ben," in similar manner to the transactions and accounts under "Big Ben." The "Baby Ben" line also included a much higher proportion of profit for plaintiff than did their other lines of products, with the exception of the "Big Ben" line.

Plaintiff on October 17, 1911, registered a trade-mark for "Baby Ben." A copy of this trade-mark is in evidence as defendant's Exhibit 5 and is by reference made a part of this finding.

XXIII. The clock products sold by plaintiff in 1910, other than the "Big Ben" and "Baby Ben," are typified by the "America" clock, as illustrated in plaintiff's Exhibit 13, which is by reference made a part of this finding. From 1909 to 1913 the mechanical differences between "Big Ben" and "Baby Ben" type of clock and the "America" clock consisted in the fact that the "Big Ben" had a longer alarm and the alarm was of the repeater type. There was no radical difference between the movements of the two types of clocks.

XXIV. The gross advertising costs for plaintiff for the years 1908 to 1912, inclusive, were as follows:

For 1908	$17, 828. 47	For 1911	$145, 068. 36
For 1909	20, 293. 30	For 1912	179, 938. 81
For 1910	70, 692. 78		

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During the years 1908 and 1909 the advertising was included in overhead as an advertising cost. In 1910, of the $70,692.78, $30,092.78 was charged direct to advertising and $40,600 was included in factory costs as a charge to "Big Ben." In 1911, of the $145,068.36, $44,838.36 was charged direct to advertising and $100,230 was included in factory costs as a charge for "Big Ben." In 1912, of $179,938.81, $52,538.81 was charged direct to advertising and $127,400 was included in factory costs as a charge to "Big Ben" and "Baby Ben."

XXV. Using a ratio of cost to selling price of the "America" clock as a factor to determine a basic income per clock, an excess income was obtained from the sale of "Big Ben" and "Baby Ben" for the years 1910, 1911, 1912, and the first two months of 1913 as follows:

	1910	1911	1912	First two months of 1913
"Big Ben"	0.21	0.20	0.175	0.18
"Baby Ben"	.11	.11	.10	.11

The total number of "Big Ben" and "Baby Ben" clocks sold in this period was as follows:

	1910	1911	1912	First two months of 1913
"Big Ben"	146,099	391,620	582,801	96,273
"Baby Ben"	4,783	18,173	43,497	10,116

This data is found in plaintiff's Exhibit 29, which is by reference made a part of this finding.

XXVI. Multiplying the number of "Big Ben" and "Baby Ben" clocks sold per year by the respective figures, giving the excess income per clock, a total of $239,233.73 is obtained, which, reduced to a yearly average, gives $75,547.47.

This figure when multiplied by the remaining life of the patent (12½ years) and reduced to a value as of March 1, 1913 (by Hoskold's formula), gives a value of $527,656.79,

which is attributed to the design; the trade-marks; effect of advertising; and the repeater alarm. One-quarter of this sum ($131,914.20) is apportioned to the design patent.

The court decided that plaintiff was entitled to recover.

BOOTH, *Chief Justice*, delivered the opinion of the court:

The plaintiff, an Illinois corporation, manufactures and sells clocks and clock movements. The business of the corporation is voluminous and its output large. In making its returns for income and excess-profits taxes for the calendar years 1917 and 1918 the plaintiff was denied a deduction from its gross income for the years in issue for the exhaustion or depreciation of certain patents owned by it and acquired prior to March 1, 1913. No jurisdictional question is involved, and the right to the deduction is conceded under par. 7 of section 5 of the revenue act of 1916, 39 Stat. 756, 759.

The plaintiff establishes the value of the patents as of March 1, 1913, by proof of the "savings" accruing to it in the cost of manufacturing its clock movements. The method pursued is predicated upon the cost of manufacturing similar clock movements by its competitors, the comparison resulting in an economic benefit to the plaintiff of great value. The defendant does not challenge the adopted method. The defense is rested upon alleged error in computation, and asserted failure to consider all the factors entering into such a comparison.

On July 5, 1902, an employee of the plaintiff, Mr. Neureuther, applied for letters patent on an automatic machine for the manufacture of clock pinions and wheels. The Patent Office required the applicant to divide his application and upon compliance therewith issued to the plaintiff, as assignee of Neureuther, on February 21, 1905, patent #782,869, and on February 19, 1907, patent #844,389. On August 29, 1911, the plaintiff, as assignee, secured the issue of a design patent, #41,725, covering a specific design of alarm clocks. These three patents constitute the basis for plaintiff's suit.

The two patents, #844,389 and #782,869, for the purposes of this case, will be treated and spoken of as the ma-

chine patent #844,389. The defendant interposes objections to so doing. However, the record clearly establishes that both patents were owned by the plaintiff, both were used in combination in the operation of the machine, and the proportionate contribution of each to the result obtained by its use is obviously immaterial under the facts. Clearly, the plaintiff is entitled to allowances for patents owned by it, and while the petition alleges patents by number, the intent is to claim all. The confusion grows out of the technical mistake upon the part of the pleader to distinguish between patents and a machine. The plaintiff began the use of the machine in 1908. The patented machine is beyond disputation a valuable labor-saving device. The machine operated by a single operator automatically produces a finished product exacting minute accuracy and delicacy in its construction. By the simple process of supplying shaft and pinion wire from coils or reels, together with molten metal and blanked wheels and washers, watch wheels accurately and permanently adjusted to shafts, with small pinion wires held in proper relation thereto, are produced. (Finding IX.) Prior to the advent of the patent, watch wheels of the desired description, with shaft and pinion adjustments, were made by hand, a process involving the utilization of three workmen, and fraught with the disadvantage of many inaccuracies and considerable wastage. By the use of one of the patented machines and a single operator 5,000 wheels a day may easily be produced, with a negligible quantity of inaccuracies and wastage. Pinion wheels are the essential and predominant factors in clock making, and the plaintiff's needs mounted into the millions. The cost of producing 10,000 wheels by the machine method, for the years 1908 to 1912, including material, labor, and overhead, was in 1908, $212.14; 1909, $208.61; 1910, $238.24; 1911, $237.70; 1912, $242.52. The cost of producing the precise number of wheels over the same period of time, upon the same basis, by hand, would be, for 1908, $442.22; 1909, $439.02; 1910, $476.86; 1911, $470.25; 1912, $481.09, more than twice as much, except for the year 1911. With these figures as a basis, the average annual saving for the years involved, per 10,000 wheels, amounts to $234.05. The plain-

tiff manufactured during the period 7,102,653 watch wheels, and its annual average increase per annum for the use of wheels during the period amounted to 155,000, in round numbers. Patent #844,389 expired February 19, 1924, and patent #782,869 expired on February 21, 1922, giving an average expiration date of the two patents of February 20, 1923, or, as set forth in Finding XVII, an average life of the two patents of approximately 10 years from March 1, 1913. Taking, then, the estimated number of wheels to be made in 10 years from March 1, 1913, as computed in Finding XVII, the total number of parts would equal 25,822,663, resulting in a total saving of $604,379.43, on the basis of an average saving of $234.05 for 10,000 wheels. This results by the application of Hoskold's formula—resort to which is not contested—in a patent worth as of March 1, 1913, spread over 10 years to March 1, 1923, of $370,121.96. (Finding XVIII.) The defendant objects, as previously observed, not so much to the method of ascertaining the patent worth as of March 1, 1913, but to what are said to be inaccurate and unreliable bases. We think we have met the defendant's criticism in the computation set out in the findings in all vital respects, and in the absence of any other available source of ascertaining value or any suggested method more clearly reflecting worth we believe the method pursued to be reliable. A patented labor-saving machine, wherein expense is greatly curtailed and output vastly multiplied, a machine which produces the essential factors of the manufacturer's product, with no loss of material, with the degree of accuracy required and in quantities sufficient to meet its trade, is entitled to be valued upon the basis of savings accruing to the user, ascertained by comparison with the cost and expense incident to the old and prior processes employed in the trade. The growth of the plaintiff's business, the obvious advantage in cost of production over its competitors, its ability to meet the increased demand for its product, together with the fact that the clocks produced were equal in all respects to others in the trade, attest in figures what the patents were worth to the plaintiff. To be able to produce at a minimum of cost and saving in labor and overhead, ascertained by comparison with the actual

expense of others engaged in doing the identical thing by hand, the essential elements of a product offered to the public for sale, surely affords an accurate criterion for measuring value. The result is predicated upon actual figures, is not conjectural, and affords a basis of actualities from which the essential deductions may logically flow.

Design patent #41,725 issued to plaintiff, was limited to 14 years. It was issued to plaintiff on August 29, 1911. The plaintiff made and sold a large number of clocks in accord with the patented design. The clocks so made and sold were known and advertised as the "Big Ben" and "Baby Ben." The plaintiff pursued the custom of marketing its various makes and designs of clocks under distinct names. In January, 1909, the plaintiff received a registered trademark "Big Ben" and thereafter manufactured and sold, in addition to its other line of clocks, a line designated as "Big Ben." From 1910 to 1913 large sums of money were expended for advertising plaintiff's products, and the amounts so expended were allocated to the different makes of clocks and the proceeds of the sale of the same charged with their proportional part thereof as cost of manufacture. The profits from the sale of "Big Ben" clocks by this method of bookkeeping disclosed a greater profit for plaintiff from "Big Ben" sales than other lines. In 1910 the plaintiff made and sold another line of clocks known and designated as "Baby Ben." By the same process of bookkeeping previously alluded to, the "Baby Ben" sales reflected the same result. On October 17, 1911, the plaintiff procured a registered trade-mark for the "Baby Ben." The demand for plaintiff's clocks is indicated in the record as follows: "Big Ben," "Baby Ben," and "America," the last being the trade name distinguishing the line from the "Big Ben" and "Baby Ben." The design of the "Big Ben" and "Baby Ben" was identical; the difference, as the names import, was one exclusively of size. There was from 1909 to 1913 a difference in the mechanical construction of the "Big Ben" and "Baby Ben" and the "America" clocks. The "Big Ben" and "Baby Ben" clocks were so constructed as to af-

ford a longer alarm than the "America" clocks and were also of the repeater type, i. e., the alarm repeated until stopped. While there existed no radical difference between the movements of the two types, the "Big Ben" and "Baby Ben" were of a more engaging appearance. The "America" was distinctly an alarm clock, one in appearance, with the alarm mounted on the top, while the "Big Ben" and "Baby Ben" disclosed no alarm features, the same being concealed. It is therefore apparent that the value to be attached to the design patent is to be ascertained by a segregation of the features and the intense advertisement of the type, in order to arrive at patent worth as of March 1, 1913. It is of course impossible to arrive at this value with mathematical exactness. Design of an article undoubtedly has its worth. Shape and form appeal to taste, and the sales of the "Big Ben" and "Baby Ben" in comparison with the "America" attest this fact. The single available method open to the court upon this record is to take the same as we find it, and apportion value to the patent in the light of the business experience of the plaintiff company. This we have done in Findings XIX, XX, XXI, XXII, XXIII, XXIV, XXV, and XXVI. The result attained is arrived at from the plaintiff's books of account. The sums used are not disputed, and we think reflect an accurate value. More than the design of the "Big Ben" and "Baby Ben" contributed to the output. Additional mechanical features, trade-marks, and intensive advertising, had as much to do with the marketing of the clocks as design. Each added feature afforded a distinct appeal, and the names adopted identified the product. Trade-marks often develop into great worth, and the record herein sustains a finding as to their worth when applied to the design clocks. Beyond doubt, the design above was not the exclusive factor which brought about the large and increasing demand for the design clocks.

The case will be remanded to the general docket with leave to the parties to compute and stipulate the amount of refund due for the years 1917 and 1918, in accord with the findings and opinion of the court. Judgement will be reserved until the case is resubmitted as per this order. It is so ordered.

WILLIAMS, *Judge*, and LITTLETON, *Judge*, did not hear and took no part in the decision of this case.

GREEN, *Judge*, and GRAHAM, *Judge*, concur.

PERCIVAL E. MAGEE v. THE UNITED STATES[1]

[No. J-675. Decided January 20, 1930]

On the Proofs

Internal revenue; statutes of limitation; revenue acts of 1916 and 1921.—Where an assessment of income tax for the year 1916 was made in October, 1921, the statute of limitations governing was the revenue act of 1921, which was retroactive to January 1, 1921, and gave the Commissioner of Internal Revenue five years after return of taxes due under prior income tax acts, and with respect to the limitation of assessment the revenue act of 1916 did not apply.

Same; claim in abatement; stay of collection; sec. 611, revenue act of 1928.—In section 611 of the revenue act of 1928 Congress referred to a stay of collection arising not by operation of law but under the practice prevailing with the collectors of internal revenue upon the filing of a claim in abatement. *Cf. Oak Worsted Mills* v. *United States, ante*, p. 539.

Same; sec. 250 (d), revenue act of 1921.—Section 250 (d) of the revenue act of 1921 did not forbid the filing of a claim in abatement before a final determination by the Commissioner of Internal Revenue of the tax due.

Same; vested right of action; repeal of sec. 1106 (a), revenue act of 1926.—Where a tax collected prior to passage of the revenue act of 1926 was not overpaid section 1106 (a) of the act did not vest in the taxpayer a right of action, and there being no such vested right none could be taken away by the repeal of section 1106 (a) or by sections 607 and 611 of the revenue act of 1928. See *Gotham Can Co.* v. *United States, ante*, p. 749.

The Reporter's statement of the case:

Mr. Theodore B. Benson for the plaintiff.

Mr. Lisle A. Smith, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

[1] Certiorari granted.

The court made special findings of fact, as follows:

In February, 1917, plaintiff made his return of income taxes for the year 1916 to the Commissioner of Internal Revenue and reported therein taxes in the sum of $10,419.35, which was accordingly paid by plaintiff. Later the commissioner audited this return and assessed additional taxes against plaintiff in the amount of $6,911.30. On November 15, 1920, plaintiff executed a waiver of the three-year limitation in regard to the assessment of additional taxes to the amount of $6,911.30 for the year 1916, as above set forth, which waiver was also signed by the commissioner. Thereafter, the commissioner made a further examination and redetermined the amount of the additional tax; and instead of $6,911.30, fixed it at $64,982.12, which was assessed in the month of October, 1921. After receiving from the collector of internal revenue a ten-day notice and demand for payment, the plaintiff, on November 15, 1921, filed with the collector a claim in abatement of the said sum of $64,982.12, which claim was forwarded by the collector to the commissioner, and by the commissioner considered. By letter dated April 19, 1923, the plaintiff was advised that the commissioner proposed to allow said claim in the amount of $18,960.41 and reject it in the amount of $46,021.71.

On receipt of a claim in abatement, it was common practice to hold up the collection of an additional assessment. The collector of internal revenue acted in accordance with this practice in this case, and in the exercise of his discretion actually held up the collection of the additional assessment, and forwarded the said claim to the Commissioner of Internal Revenue in due course. The collector made no further endeavor to collect the amount covered by the claim in abatement until after the claim had been finally adjusted by the Commissioner of Internal Revenue.

The plaintiff protested the determination of the commissioner, as above set forth, and his appeal was transmitted to the committee on appeals and review, which, after oral hearings, sustained the commissioner upon all points except one, on August 9, 1923. In compliance with the recommendation of said committee, a certificate of overassessment in the amount of $21,952.28 was prepared and issued to the

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plaintiff by the commissioner; and on February 12, 1924, the commissioner formally allowed the claim in abatement in the amount of $21,952.28, and rejected it in the amount of $43,029.84, for which sum with interest the collector, on May 13, 1924, made demand on plaintiff. In compliance with this demand, the plaintiff made payments as follows:

May 23, 1924:	
Tax	$28, 864. 34
Interest	1, 135. 66
June 17, 1924:	
Tax	11, 116. 26
Interest	3, 039. 62
July 11, 1925:	
Tax	3, 049. 24
Interest	665. 91
Total of tax and interest	47, 871. 03

On December 12, 1927, the plaintiff filed with the commissioner a claim for refund in the amount of $47,205.12, representing the said additional tax in the amount of $43,029.84, together with interest thereon. This claim for refund was considered by the commissioner and rejected.

The parties agree that in this case there is no deficiency nor part of a deficiency attributable to a change in a deduction tentatively allowed under paragraph (9) of subdivision (a) of section 214, or paragraph (8) of subdivision (a) of section 234 of the revenue act of 1918 or the revenue act of 1921.

The court decided that plaintiff was not entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

This is a suit begun to recover $47,871.03, upon a claim for refund of taxes filed by the plaintiff on December 12, 1927, and rejected by the Commissioner of Internal Revenue.

The facts in the case are not in dispute. Plaintiff filed his individual income-tax return for the calendar year 1916 with the collector of internal revenue, and paid the amount shown to be due by the return in 1917. Thereafter, the Commissioner of Internal Revenue audited the return and determined that an additional tax was due in the sum of $6,911.30,

and on November 15, 1920, the plaintiff and the commissioner signed a so-called waiver, by which plaintiff waived the three-year limitation in regard to the assessment of additional taxes for the year 1916, for $6,911.30. The additional assessment of $6,911.30, however, is only mentioned in the sequence of events as it has no bearing on the questions involved in the case, and the claim made by plaintiff that by signing the waiver the commissioner agreed that no change should be made in the assessment has no foundation in law or fact.

Thereafter the commissioner made a further examination of plaintiff's income-tax return, and during the month of October, 1921, made an additional assessment of $64,982.12, for which notice and demand for payment was sent to plaintiff, who thereupon on November 15, 1921, filed a claim in abatement for the full amount of such additional assessment.

The parties agree that upon receipt of the claim in abatement it was common practice to hold up the collection of an additional assessment. Following this practice, the collector refrained from the collection of an additional assessment and forwarded the claim in abatement to the commissioner. The collector made no further endeavor to collect the amount covered by the claim in abatement until after the claim had been finally adjusted by the Commissioner of Internal Revenue.

The claim in abatement was formally allowed by the commissioner on February 12, 1924, in the amount of $21,952.28, and was rejected in the amount of $43,029.84, for which sum notice and demand was sent by the collector to the plaintiff May 13, 1924. Plaintiff discharged the demand by the payment thereof with interest in three installments, two in 1924 and one in 1925, the total amount of tax and interest so paid being $47,871.03.

As before stated, the plaintiff filed a claim for refund which was disallowed. The amount of this claim was $47,205.12, representing the additional tax of $43,029.84 together with interest thereon.

Two propositions are presented by plaintiff which constitute the issues in the case: First, that the assessment of the tax was illegal, being made after the expiration of the statute

of limitations applicable thereto, which as plaintiff claims was a three-year period prescribed in section 9 (a) of the revenue act of 1916; second, that sections 607 and 611 of the revenue act of 1928 have no application to the facts in the case at bar, or if held to be applicable so as to deprive plaintiff of the right to maintain its action to recover the taxes in controversy section 611 is unconstitutional and void.

The contention that the assessment of the tax was illegal is based on the theory that the statute of limitations applicable to the assessment of the tax was section 9 (a) of the revenue act of 1916. We think it manifest that the period of limitations was that prescribed by the 1921 act. This act did not go into effect until November 23, 1921, but by its terms it was expressly made retroactive to January 1, 1921, and the assessment in controversy was made in October, 1921. The 1921 act repealed the provisions of the 1916 act which refer to the matters in controversy in this case and provided that the amount of any "taxes due under any return made under this act for prior taxable years or under prior income, excess-profits, or war-profits tax acts * * * shall be determined and assessed within five years after the return was filed." In this case the taxes were due "under prior income * * * tax acts." The 1921 act having been made retroactive with reference to assessments, its effect in this case was the same as if it had been enacted on January 1, 1921, and had been in force when the assessment was made. It therefore appears to us clear that the five-year limitation of the 1921 act applied, and that the assessment, having been made within five years from the time when the original return was made by plaintiff, was not barred by limitation. Defendant claims that, as applied to the facts in this case, there was no limitation provided by the 1916 act for the assessment of taxes. As we hold that the 1916 act does not apply, it becomes unnecessary for us to pass upon the point thus raised.

Discussing the second proposition presented by plaintiff, it will be observed that the tax involved herein was not collected until more than five years after the filing of the return and the defendant concedes that under the decision in *Bowers* v. *New York & Albany Lighterage Co.*, 273 U. S.

Opinion of the Court

346, plaintiff can recover the amount so collected unless prevented by the provisions of sections 607 and 611 of the act of 1928. These two sections are set out in full and discussed at length in the case of *Oak Worsted Mills* v. *United States*, No. J–180, decided by this court December 2, 1929 [*ante* p. 539], but as there is a claim that the facts in this case are somewhat different from those in the *Oak Worsted Mills case*, *supra*, we again quote from the 1928 act these two sections, as follows:

"SEC. 607. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST UNITED STATES.—Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim."

"SEC. 611. COLLECTIONS STAYED BY CLAIM IN ABATEMENT.—If any internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this act) shall not be considered as an overpayment under the provisions of section 607, relating to payments made after the expiration of the period of limitation on assessment and collection."

Coming now to a consideration of the contention of the plaintiff that sections 607 and 611 of the act of 1928 have no application to the case at bar, we find that it is based on two propositions:

First, that the tax in question was not assessed within the period of limitations and hence is not covered by section 611.

Second, that section 611 applies only to cases where a claim in abatement was filed and the collection of the tax was thereby stayed.

Our views on the first of these two propositions have already been expressed and we have found that the tax being assessed under the 1921 act, was assessed "within the

period of limitation properly applicable thereto" as required by section 611.

The second proposition has in most respects been discussed at length in the *Oak Worsted Mills case*, wherein we held that Congress in section 611 did not refer to a legal stay existing by virtue of the plea of abatement, for such a thing did not exist. At no time did the law contain any provision for a plea of abatement bringing about a stay and at no time did it in fact legally stay the collection of the tax. Plaintiff's claim therefore is in substance that section 611 applies only to cases which never have arisen and never could arise. It has been said in some decisions that have been called to our attention that taxing statutes should be construed liberally in favor of the taxpayer, but this rule surely has some limits and ought not to be applied where the intent of Congress is so clearly manifest as it is in this matter. The report of the Ways and Means Committee upon the act of 1928, which so far as it pertains to sections 607 and 611, is set out in full in the *Oak Worsted Mills case*, shows very plainly what Congress intended. It states that—

"Prior to the enactment of the revenue act of 1924 it was the administrative practice to assess immediately additional taxes determined to be due. Upon the assessment taxpayers were frequently *permitted* to file claims in abatement with the collector *and thus delay the collection* until the claim in abatement could be acted upon." (Italics ours.)

It thus appears that what Congress had in mind was the delay of the collector in collecting a tax brought about by the filing of the claim in abatement. The stipulation in the case at bar shows that it was the practice where a claim in abatement was filed to "hold up" the collection of the tax until the claim in abatement had been passed upon and that the collector acted in accordance with the practice in the instant case. The rule contended for by plaintiff with reference to the construction of statutes liberally can not, we think, be expanded so as to make the statute meaningless and useless, for this is not liberality of construction but extreme technicality. As we said in the *Oak Worsted Mills case*,

the general rules with reference to construction of statutes require that they should be construed so as to give effect to the intent of the legislative body which enacted them. The intent is, we think, quite manifest from the language of section 611 itself, especially when it is applied to the situation which we have described above, under which claims in abatement never acted as a legal stay. If anything more is needed, it is found in the report of the committee, which definitely sets out the intent of the proposed law.

In one respect this case is different from that of the *Oak Worsted Mills case*. The assessment was made under the 1921 law and plaintiff calls attention to a provision in that act providing that in certain cases, "no claim in abatement of the amount so assessed shall be entertained." This provision is found in subdivision (d) of section 250. This subdivision provided that a taxpayer should be notified when a deficiency in a tax was discovered and given thirty days in which to file an appeal and show cause or reason why the tax or deficiency should not be paid; also that opportunity for hearing should be granted. When the notice of the deficiency was served in the instant case, the plaintiff filed the claim in abatement which might be considered his showing of a "cause or reason why the tax or deficiency should not be paid." Until after there was a decision on this showing, there was nothing forbidding a claim in abatement to be entertained. The law required final decision to be made "as quickly as practicable," but "any tax or deficiency in tax then determined to be due" was then required to be paid within ten days after notice and demand. Stated concisely, the statutory requirements were that when a deficiency was found, the taxpayer should be notified and given an opportunity to show cause why it should not be paid. No particular form was required for this showing, and it should be kept in mind that it is only *after* the determination and assessment of the tax that the statute says "no claim in abatement of the amount so assessed shall be entertained." There was nothing in the law forbidding the filing of a plea in abatement *before* determination and assessment, and plaintiff filed his plea in abatement after notice of the deficiency

but prior to such determination. It was the common practice to so file pleas in abatement and have them considered before final determination of the tax was made. In fact, this was a perfectly logical and natural way for the taxpayer to present his claim that the taxes assessed against him ought to be reduced and there was nothing in the statute forbidding the taxpayer following this method in presenting his case. In the instant case the plea of abatement was considered by the commissioner and in part granted and in part refused, which action constituted the decision of the commissioner. Under the particular circumstances of this case, neither the statute nor the facts support the contention of plaintiff that the filing of the plea of abatement was forbidden by law.

The plaintiff contends that while this court has authority to determine a refund and enter judgment for its payment, it has no authority to determine an overpayment. But what is it that is refunded? Certainly nothing but an overpayment, and the finding of an overpayment is necessary in order to establish the right to a refund. All the works on income taxes so treat this matter. When suit is brought in this court on a claim against the United States, if it is one within its jurisdiction, the court has power to adjudicate and determine all matters necessary to the establishment of the validity of the claim. The argument made by plaintiff on this point is without weight.

The plaintiff also contends that while section 1106 (a) of the act of 1926 was repealed as of the date of its enactment by the 1928 act, a right had been vested in plaintiff to bring this suit which could not be taken away by the repeal of the statute or by sections 607 and 611 of the act of 1928.

The questions arising on this point have been so fully discussed in the case of *Gotham Can Co.* v. *United States*, No. J–255, this day decided by this court [*ante*, p. 749], that we think nothing further need be added. We adhere to our conclusion in the case last named that section 1106 did not confer upon the plaintiff any right to maintain an action against the Government for taxes collected prior to the passage of the 1926 act unless the tax had been overpaid.

As no such right was vested, none was taken away and therefore no constitutional principle is violated. The facts in the case at bar are precisely similar so far as the application of section 1106 is concerned.

It follows from what has been said that plaintiff's action must be dismissed and it is so ordered.

WILLIAMS, *Judge;* LITTLETON, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

CASES DECIDED

IN

THE COURT OF CLAIMS

JUNE 1, 1929 TO JANUARY 31, 1930

INCLUSIVE, IN WHICH JUDGMENTS WERE RENDERED BUT NO OPINIONS DELIVERED

No. B-371. June 18, 1928

Southern Pacific Co.[1]
Transportation of private mounts of Army officers, $595.29.

No. E-386. June 3, 1929

Galveston, Harrisburg & San Antonio Ry. Co.
Transportation at less-than-carload rates, $337.36.

No. C-920. June 3, 1929

Harry R. Carroll et al.
Contract for draft fans, $80.28. Following *Carroll et al.* v. *United States*, 67 C. Cls. 513.

No. F-132. June 10, 1929

North American Provision Co.
Contract for sugar-cured hams, $890.34.

No. K-37. June 10, 1929

Thomson & Kelly Co.
Contract for purchase of surplus property, U. S. Veterans' Bureau. Dismissed.

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[1] Defendant's motion for new trial overruled June 3, 1929; plaintiff's motion for new trial overruled December 2, 1929.

No. H-425. OCTOBER 21, 1929

Hooper-Mankin Fuel Co.

Refund of income and profits taxes, $3,362.55, with interest.

No. C-1059. NOVEMBER 4, 1929

Chicago, Rock Island & Pacific Ry. Co.

Land-grant deductions, act of October 6, 1917, $75.68.

No. H-337. NOVEMBER 4, 1929

James DeB. Walbach.

Army pay; dependent mother; rental and subsistence allowances; sec. 4, act of June 10, 1922, $1,747.94. (See 67 C. Cls. 239).

No. K-84. NOVEMBER 4, 1929

Barnett T. Talbott.

Rental and subsistence allowances in right of dependent mother, U. S. Navy. Dismissed.

No. F-221. NOVEMBER 4, 1929

Michigan Central R. R. Co.

Transportation of military impedimenta. Dismissed.

No. 30532. NOVEMBER 14, 1929

Harvey B. Cox, administrator of the estate of Peter P. Pitchlynn, deceased, v. *Choctaw Nation.*

Compensation for services rendered Choctaw Nation, $3,113.92. See *Pitchlynn et al.* v. *Choctaw Nation*, 59 C. Cls. 796.

No. D-7. DECEMBER 2, 1929

Glenn F. Lyon.

Pay, Chief Pharmacist, U. S. Navy. Dismissed.

No. D-9. DECEMBER 2, 1929

Henry McEvoy.

Pay, Chief Gunner, U. S. Navy. Dismissed.

No. K–418. DECEMBER 9, 1929

Wharton & Northern R. R. Co.
Transportation of freight. Dismissed.

No. H–12. DECEMBER 16, 1929

William Smith.
Difference in pay by reason of demotion. Dismissed.

No. C–1002. DECEMBER 23, 1929

Chicago, Rock Island & Pacific Ry. Co.
Transportation of freight to Fort Sill and Camp Doniphan, $3,039.90.

No. C–1073. DECEMBER 23, 1929

Missouri-Kansas-Texas R. R. Co.
Land-grant deductions, act of October 6, 1917, $1,884.21.

No. J–58. JANUARY 13, 1930

C. Kenyon Co.
Contract for rubber coats, $4,592.82.

No. C–768. JANUARY 20, 1930

Ray & Gila Valley R. R. Co.
Transportation of military impedimenta within Arizona; expedited movement of military impedimenta, $5,588.36.

No. H–407. JANUARY 20, 1930

American-Hawaiian Steamship Co.
Transportation of the mail between United States and Panama Canal Zone, $14,147.40.

No. H–383. JANUARY 20, 1930

Luckenbach Steamship Co.
Transportation of the mail between United States and Panama Canal Zone, $30,370.94. On mandate of Supreme Court. (66 C. Cls. 679; 280 U. S. 173.)

CASES DISMISSED BY THE COURT OF CLAIMS PERTAINING TO REFUND OF TAXES

ON JUNE 3, 1929

H-170. Dunlevy Milbank et al.

ON JUNE 10, 1929

H-332. Arkwright Club.
J-37. Mrs. Nellie Miller, guardian.
J-118. Richard L. Walker et al.
J-664. Atlantic Coast Line R. R.
J-666. O. E. Foster.

ON OCTOBER 14, 1929

J-40. U. S. Light & Heat Corp.
K-76. Calumet Storage Battery Co.

ON OCTOBER 15, 1929

J-68. Continental Rubber Works.
J-141. Beneke Mfg. Co.

ON OCTOBER 21, 1929

E-14. Synthetic Patents Co.
E-116. Pacific Mutual Life Ins. Co.
F-151. J. C. Penney Co.
F-185. Pacific Mutual Life Ins. Co.
F-254. Dublin Chero Cola Bottling Co.
H-9. F. S. Royster Mercantile Co.
H-23. Denver Dry Goods Co.
H-257. George's Creek Coal Co.
H-266. Henry M. Pendleton et al., exrs.
H-315. Chicago Yellow Cab Co.
H-419. Equity Savings & Loan Co.
H-478. Atlanta & Charlotte Air Line Ry. Co.
J-3. H. Jevne Co.
J-72. J. Lawrence Sprunt, executor.
J-74. James Lawrence Sprunt.
J-75. William H. Sprunt.
J-77. Alexander Sprunt.
J-177. Elm Mills Woollen Co.
J-187. Evelyn Alms Smock.
J-227. W. J. Dangaix.
J-271. Rockford Malleable Iron Works.
J-300. Midland Valley R. R. Co.
J-336. Richard Young Co.
J-560. Paul J. Bertelsen, receiver.
J-565. Edgar Bros. Co.
J-566. Henry B. Plant et al., exrs.
J-617. Old Colony Trust Co., executor.
J-622. William Brown Co.
J-628. Michigan Paper Co.
J-635. Comey & Johnson Co.
K-42. Milo L. Rowell, trustee.
K-43. Los Angeles First National Trust Co.
K-110. Joseph Leman, jr.
K-130. Economy Savings & Loan Co.
K-133. First National Bank of Montgomery.
K-270. Matthiessen & Hegeler Zinc Co.

ON NOVEMBER 4, 1929

H-250. Fawcus Machine Corp.[1]
J-1. John Gilbert et al.
J-182. Vanadium Corporation.
J-447. Walter W. Pollock.

[1] Certiorari granted.

ON DECEMBER 2, 1929

D-556. Ewa Plantation Co.
E-208. Amy H. Du Puy.[1]
H-29. J. C. Pennoyer Co.
H-141. Crompton & Knowles Loom Works.
H-379. Richards & Brennan Co.
H-556. Atlantic Coast Line R. R. Co.
J-7. Wolke Battery Co.
J-14. Peerless Storage Battery Co.
J-15. Wolke Lead Battery Co.
J-274. Setters Brothers, Inc.
J-552. Barker Brothers.
J-561. F. Kieser & Son Co.
J-648. M. Gertrude Semmes et al.
J-649. M. Gertrude Semmes et al.
K-55. David Millar, etc.
K-79. Stanley Field.
K-163. Ruth Hollander.
K-164. Lester Rosenfield.

ON DECEMBER 9, 1929

F-128. Northwestern Mutual Life Ins. Co.
H-314. James W. Johnson.
J-142. Ware Shoals Mfg. Co.

ON DECEMBER 16, 1929

H-75. Sioux City Iron Co.
H-160. Arcade Mfg. Co.
H-214. Edward H. Bragg et al.
J-44. Rex Paper Co.
J-100. Flint & Walling Mfg. Co.
J-275. C. S. Pierce Pressing Co.
J-294. R. Herschel Mfg. Co.

ON JANUARY 13, 1930

J-155. Chas. G. Willoughby.
J-234. Harvey Coal Co.
J-290. Rochester Top Lift Co.
J-630. Rust Land & Lumber Co.
K-46. Spiegel House Furnishing Co.
K-75. John Edward Stuntz.
K-151. Lindsay Light Co.
K-157. Robert E. Tod et al.

ON JANUARY 20, 1930

K-57. Home Builders' Loan Association.

[1] Certiorari denied.

ABSTRACT OF DECISIONS

OF

THE SUPREME COURT

IN COURT OF CLAIMS CASES

UNITED STATES v. GALVESTON, HARRISBURG & SAN ANTONIO RY. CO.

[66 C. Cls. 739; 279 U. S. 401]

Judgment was rendered against the United States in the court below. Upon certiorari the judgment was *affirmed*, the Supreme Court deciding:

1. The obligation of railroads, under the land-grant acts, to transport property of the United States at less than commercial rates, is to be fairly and sensibly read according to the words employed and not expanded or restricted by construction.
2. Authorized mounts furnished by Army officers and transported at the expense of the United States, are not property of the United States within the meaning of the land-grant acts.

Mr. Justice Butler delivered the opinion of the Supreme Court May 13, 1929.

OKANOGAN INDIAN TRIBES ET AL. v. UNITED STATES

(Pocket Veto Case)

[66 C. Cls. 26; 279 U. S. 655]

Judgment was rendered in favor of the United States in the court below. Upon certiorari the judgment was *affirmed*, the Supreme Court deciding:

1. Under the second clause of section 7 of Article I of the Constitution, a bill which is passed by both Houses of Congress during the first regular session of a particular Congress and presented to

Syllabus

the President less than ten days (Sundays excepted) before the adjournment of that session, but is neither signed by the President nor returned by him to the House in which it originated, does not become a law.

2. The Constitution in giving the President a qualified negative over legislation—commonly called a veto—entrusts him with an authority and imposes upon him an obligation that are of the highest importance, in the execution of which it is made his duty not only to sign bills that he approves in order that they may become law, but to return bills that he disapproves, with his objections, in order that they may be reconsidered by Congress.
3. The faithful and effective exercise of this duty necessarily requires time in which the President may carefully examine and consider a bill and determine, after due deliberation, whether he should approve or disapprove it, and if he disapproves it, formulate his objections for the consideration of Congress. To that end a specified time is given, after the bill has been presented to him, in which he may examine its provisions and either approve it or return it, not approved, for reconsideration.
4. The power thus conferred upon the President can not be narrowed or cut down by Congress, nor the time within which it is to be exercised lessened, directly or indirectly.
5. It is just as essential a part of the constitutional provisions guarding against ill-considered and unwise legislation, that the President, on his part, should have the full time allowed him for determining whether he should approve or disapprove a bill, and if disapproved, for adequately formulating the objections that should be considered by Congress, as it is that Congress, on its part, should have the opportunity to repass the bill over his objections.
6. When the adjournment of Congress prevents the return of the bill within the allotted time, the failure of the bill to become a law can not properly be ascribed to the disapproval of the President—who presumably would have returned it before the adjournment if there had been sufficient time in which to complete his consideration and take such action—but is attributable solely to the action of Congress in adjourning before the time allowed the President for returning the bill had expired.
7. The phrase "within ten days (Sundays excepted)" in the clause of the Constitution here in question refers not to legislative days but to calendar days.
8. The term "adjournment," as used in this constitutional provision, is not limited to the final adjournment of the Congress.
9. The determinative question in reference to an "adjournment" is not whether it is a final adjournment of Congress or an interim adjournment, such as an adjournment of the first ses-

Syllabus

sion, but whether it is one that "prevents" the President from returning the bill to the House in which it originated within the time allowed.

10. An interim adjournment of Congress at the end of the first session, as the result of which, although the legislative existence of the House in which the bill originated has not been terminated, it is not in session on the last day of the period allowed the President for returning the bill, prevents him from returning it to such House.
11. The "House" to which the bill is to be returned is a House in session—sitting in an organized capacity for the transaction of business, and having authority to receive the return, enter the President's objections on its journal, and proceed to reconsider the bill; and no return can be made to the House when it is not in session as a collective body and its members are dispersed.
12. This accords with the long established practice of both Houses of Congress to receive messages from the President while they are in session.
13. There is no substantial basis for the suggestion that, although the House in which the bill originated be not in session, the bill may nevertheless be returned, consistently with the constitutional mandate, by delivering it, with the President's objections, to an officer or agent of the House, for subsequent delivery to the House when it resumes its sittings at the next session, with the same force and effect as if the bill had been returned to the House on the day when it was delivered to such officer or agent.
14. The above construction is confirmed by the practical construction given to this provision of the Constitution by the Presidents through a long course of years, and in which Congress has acquiesced.

Mr. JUSTICE SANFORD delivered the opinion of the Supreme Court May 27, 1929.

OSAGE INDIANS v. UNITED STATES

[66 C. Cls. 64; 279 U. S. 811]

Judgment was rendered in favor of the United States in the court below. On February 25, 1929, a petition for writ of certiorari was *denied* by the Supreme Court, and on the authority of the act of February 13, 1925, 43 Stat. 936, the appeal made in the case was *dismissed* for lack of jurisdiction.

FISLER v. UNITED STATES

[66 C. Cls. 220; 279 U. S. 836]

Petition for writ of certiorari was *denied* by the Supreme Court February 25, 1929.

FEATHER RIVER LUMBER CO. v. UNITED STATES

[66 C. Cls. 54; 279 U. S. 837]

Petition for writ of certiorari was *denied* by the Supreme Court February 25, 1929.

CORNING DISTILLING CO. v. UNITED STATES

[66 C. Cls. 268; 279 U. S. 843]

Petition for writ of certiorari was *denied* by the Supreme Court March 11, 1929.

CHAMBERLAIN v. UNITED STATES

[66 C. Cls. 317; 279 U. S. 845]

Petition for writ of certiorari was *denied* by the Supreme Court April 8, 1929.

C. B. FOX COMPANY v. UNITED STATES

[66 C. Cls. 447; 279 U. S. 848]

Petition for writ of certiorari was *denied* by the Supreme Court April 15, 1929.

MINNESOTA MUTUAL LIFE INS. CO. v. UNITED STATES

[66 C. Cls. 481; 279 U. S. 856]

Petition for writ of certiorari was *denied* by the Supreme Court April 29, 1929.

FORMER CORPORATION v. UNITED STATES

[66 C. Cls. 83; 279 U. S. 857]

Petition for writ of certiorari was *denied* by the Supreme Court April 29, 1929.

ADVANCE AUTOMOBILE ACCESSORIES CORP. v. UNITED STATES

[66 C. Cls. 304; 279 U. S. 859]

Petition for writ of certiorari was *denied* by the Supreme Court May 13, 1929.

S. S. WHITE DENTAL MFG. CO. v. UNITED STATES

[66 C. Cls. 624; 279 U. S. 862]

Petition for writ of certiorari was *denied* by the Supreme Court May 20, 1929.

RIVERSIDE MFG. CO. v. UNITED STATES

[67 C. Cls. 117; 279 U. S. 863]

Petition for writ of certiorari was *denied* by the Supreme Court May 20, 1929.

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JAMES CLARK DISTILLING CO. v. UNITED STATES

[66 C. Cls. 726; 279 U. S. 868]

Petition for writ of certiorari was *denied* by the Supreme Court May 27, 1929.

COLGATE, ADMINISTRATOR v. UNITED STATES

[66 C. Cls. 667; 280 U. S. 43]

Judgment was rendered in favor of the United States in the court below. The plaintiff therein appealed, and on his statement as to jurisdiction the Supreme Court *dismissed* the appeal, deciding that—

Under a special jurisdictional act approved March 3, 1927 (44 Stat. 1807), which referred back to the Court of Claims for rendition of a judgment certain findings of fact theretofore made by it and reported to Congress, and provided for an "appeal" to this court by either party "upon or from any conclusion of law or judgment, from which appeals now lie in other cases," the review intended was the usual method of review at the date of the special act, which was and is by application for a writ of certiorari, and not a technical appeal.

Mr. CHIEF JUSTICE TAFT delivered the opinion of the Supreme Court November 4, 1929.

LUCKENBACH STEAMSHIP CO. v. UNITED STATES

[66 C. Cls. 679; 280 U. S. 173]

Judgment was rendered in favor of the United States in the court below. Upon certiorari the judgment was *reversed*, the Supreme Court deciding:

1. Ports in the Canal Zone are to be regarded as foreign ports within the meaning of Rev. Stats. Sec. 4009, U. S. Code, Title 39, sec. 654, dealing with the compensation allowable for transportation of mail, by United States ships, between the United States and

Syllabus

"any foreign port." So *held* because of a long continued legislative and administrative construction of the section in its application to the Canal Zone, and without regard to whether under the treaty of cession titular sovereignty over the Zone remains in the Republic of Panama.

2. In case of ambiguity, a construction of a statute by the department charged with its execution should be favored by the courts, and where such construction has been acted on for a number of years they will look with disfavor upon any sudden change whereby parties who have contracted with the Government on the faith of it may be prejudiced.

Mr. CHIEF JUSTICE TAFT delivered the opinion of the Supreme Court January 6, 1930.

COOPER v. UNITED STATES

[67 C. Cls. 711; 280 U. S. 409]

Judgment was rendered in favor of the United States in the court below. Upon certiorari the judgment was *affirmed*, the Supreme Court deciding:

The revenue act of November 23, 1921, effective from the beginning of that calendar year, provides, section 202 (a) (2), that, in ascertaining the gain from a sale of property acquired after February 28, 1913, the basis shall be the cost, and that in case of property acquired by gift after December 31, 1920, "the basis shall be the same as that which it would have in the hands of the donor or the last preceding owner by whom it was not acquired by gift." In November, 1921, A gave to B shares which A had bought in 1918 and which had increased in value. B sold them at that increased value within a week and was taxed on the basis of the difference between the price paid by A and the price received by B. *Held:*

1. The statute intends to reach the transaction retroactively.
2. As so applied it is not invalid under the due process clause of the fifth amendment.

Mr. JUSTICE MCREYNOLDS delivered the opinion of the Supreme Court February 24, 1930.

INDEX DIGEST

SALE OF SUPPLIES.

I. The condition of a sale of property that the same is sold "as is" and "where is," without warranty or guaranty as to quality, character, condition, size, weight, or kind, does not extend to the identity of the thing sold, and where articles are auctioned off by lot number and description, without being segregated in the lots so described, the successful bidder may rescind the sale. *Ellis*, 11.

II. Where a catalogue describing Government property to be sold by auction, made by its terms a condition of sale, provides that "no representative of the Government is authorized to make any statement or representation as to quality, character, condition, size, weight, or kind, of any property offered," an announcement by the officer in charge that articles in certain lots catalogued will be reassorted into classes and buyers given their percentage of each class, is unauthorized and does not bind a successful bidder who bid on the property as described in the catalogue. *Id.*

III. The authority of the Secretary of War under the act of July 11, 1919, in the sale of surplus supplies, "upon such terms as may be deemed best," was more than that of a mere sales agent, and a refund to a vendee in accordance with the custom of the trade, on goods not yet resold by it, of the difference between the price previously agreed to and paid and a lower price thereafter offered to purchasers, was within the Secretary's authority, notwithstanding the absence of a benefit passing from the vendee. And where a portion of the original sale was canceled by the parties thereto and other articles exceeding in quantity and value substituted, there was a sufficient additional consideration to establish the validity of the new contract. *American Stores Co.*, 128.

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